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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3481
N. 3481
MAY 10 1968
✓

R. D. PENDLETON,
Appellant,
vs.
L. S. NELSON,
Warden, et al.,
Appellee.

No. 22463

APPELLEE'S BRIEF

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FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. D. PENDLETON,)	
)	
Appellant,)	
)	
vs.	)	No. 22463
)	
L. S. NELSON,)	
Warden, et al.,)	
)	
Appellee.)	

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, U.S.C. section 2241. The jurisdiction of this Court is conferred by Title 28, U.S.C. section 2253, which makes a final order in a habeas corpus proceeding reviewable by the Court of Appeals, when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

Appellant was convicted in 1964 of possession of marijuana; possession of marijuana for sale and statutory rape.^{1/} Thereafter, the conviction for statutory rape was

1. The actual sequence of these events is somewhat confusing. On or about January 1, 1964, appellant committed the crimes of statutory rape and possession of marijuana. On or about February 1, 1964, appellant committed the crimes

reversed by the California Court of Appeal, Second District. The remaining counts were affirmed. See People v. Pendleton, Crim. No. 10215 and Crim. No. 10473. (This opinion was not certified for publication pursuant to Rule 976 of the California Rules of Court.)

Thereafter appellant petitioned for a hearing in the Supreme Court of California which was denied. Appellant's petition for a rehearing in the state Supreme Court was also denied.

B. Proceedings in the federal court

On September 8, 1967, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California. On November 22, 1967, the United States District Court denied appellant's petition for a writ of habeas corpus. On December 19, 1967, appellant filed his notice of appeal and the court granted appellant's application for a certificate of probable cause and allowed him to appeal *informa pauperis*.

STATEMENT OF FACTS

Appellant was tried and convicted at two separate trials, which were consolidated on appeal. The Court of Appeal, Second District reversed in part and affirmed in

fn. 1 continued
of possession of marijuana and possession of marijuana for sale. Appellant was sentenced for the February 1st offense on May 15, 1964, and for the January 1st offense on June 29, 1964.

part. ^{2/}

The facts are summarized in the opinion of the California Court of Appeal.

THE FIRST OFFENSE - SECOND TRIAL (Statutory rape and possession of marijuana).

A 17-year-old girl complained to police that she and Pendleton had had sexual intercourse after he had given her narcotics at a motel. Officer Vernon went to Pendleton's apartment and arrested him for statutory rape and furnishing narcotics to minors. A female co-occupant of the apartment was permitted to use the bathroom. When she came out, the officers noted the bathroom window, which had been closed, was wide open. They searched under the window and found a package containing four marijuana cigarettes. Pendleton was confronted with the four cigarettes and asked if they were his or the woman's. He replied, "I will take the beef, they are mine." The officer said "I didn't ask you that, I asked you whose are they?" Pendleton again stated "I will take the beef, they are mine."

THE SECOND OFFENSE - FIRST TRIAL (possession of marijuana and possession of marijuana for sale).

While Pendleton was in custody on the earlier charges, he had told Officer Burke he had been selling large

2. The unpublished opinion of the California Court of Appeal is appended by appellee as Exhibit "A". See 28 U.S.C.A., § 2254(d).

quantities of marijuana in the Watts area. Pendleton's girl friend had also told the officer she had seen Pendleton with large quantities of marijuana. Three weeks later, Officer Burke parked outside Pendleton's apartment house and observed Pendleton and co-defendant Hampton drive into the driveway. The officers did not know who owned the car but Hampton was driving. The officers identified themselves and asked Pendleton, "Do you have any narcotics on you or in the car?" Pendleton replied "No. Go ahead and look." Hampton remained silent. The officers searched the car and found about three-quarters of a pound of marijuana. Both defendants were then arrested.

SUMMARY OF APPELLANT'S CONTENTIONS

1. Appellant was denied his right to remain silent and his right to an attorney.

2. There was no probable cause to arrest appellant without a warrant.

SUMMARY OF APPELLEE'S CONTENTIONS

I. The standards established in Escobedo v. Illinois are not applicable as appellant's trial occurred before the date of that opinion.

II. There was probable cause to arrest appellant and to conduct a search incident to that arrest (1st offense - 2nd trial).

III. Appellant consented to the search (2nd offense - 1st trial).

ARGUMENT

I.

THE STANDARDS ESTABLISHED IN ESCOBEDO V. ILLINOIS ARE NOT APPLICABLE AS APPELLANT'S TRIAL OCCURRED BEFORE THE DATE OF THAT OPINION.

The District Court stated in its order denying the petition that petitioner claimed that he was denied his right to counsel and his right to remain silent. The court held that this contention was without merit stating that appellant's trial began on June 1, 1964, and therefore the guidelines set forth in Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966) are not applicable. See Johnson v. New Jersey, 384 U.S. 719 (1966). In so ruling, the district court was unquestionably correct.

II.

THERE WAS PROBABLE CAUSE TO ARREST
APPELLANT (1st Offense - 2nd Trial).

Appellant was arrested pursuant to a complaint of a minor who alleged that appellant had had sexual relations with her. The search of the premises which disclosed the four marijuana cigarettes was proper as incidental to the arrest. Harris v. United States, 331 U.S. 145 (1947); Ker v. California, 374 U.S. 23 (1963).

III.

APPELLANT CONSENTED TO THE SEARCH (2nd Offense - 1st Trial)

Appellant contends there was no probable cause for the arrest because the consent to search the car was not given voluntarily. He argues it was involuntary because he submitted to the authority of the officers "under great pressure." This contention is without merit. The question of consent is basically a question of fact to be determined by the trial court. (People v. Shelton, 60 Cal.2d 740, 746 (1964); Castaneda v. Superior Court, 59 Cal.2d 439, 442 (1963); People v. Campos, 184 Cal. App.2d 489, 494 (1960).) The trial court found the consent was voluntary, taking into account the fact that Pendleton was not under arrest (Castaneda v. Superior Court, 59 Cal.2d 439, 443 (1963)), that the officers had the right to interview suspects (People v. Michael, 45 Cal.2d 751, 754 (1955)), and that the officers did not assert any right to search the car (People v. Michael, 45 Cal.2d 751, 754 (1955)). No doubt the defendant was somewhat nervous, since he found himself talking to the police while in the act of transporting a bulk package of marijuana, but this is hardly enough to sustain a claim of actual or implied assertion of authority to search by the police. California Court of Appeal Opinion, pages 4-5.

The district court came to the same conclusion, stating in the order denying the petition:

". . . petitioner admits that he consented to each of the two separate searches. Therefore, this court need not even reach the question whether the searches were illegal, as petitioner has waived any possible objection. Cf. Stoner v. California, 376 U.S. 483 489 (1964). Moreover, while petitioner now baldly argues that his consent was not voluntarily given, he alleges no supporting facts whatever." United States District Court Opinion, page 3. Also see California Court of Appeal Opinion, pages 5, 6.

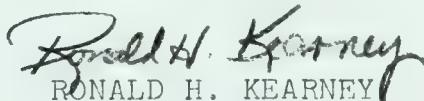
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court denying the writ of habeas corpus should be affirmed.

DATED: April 19, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General


RONALD H. KEARNEY
Deputy Attorney General

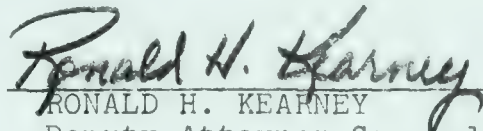
Attorneys for Appellee

RHK:lp
67-1797

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: April 19, 1968



RONALD H. KEARNEY
Deputy Attorney General

RHK:lp

A P P E N D I X

64-986

Crim. No. 10215
and
Crim. No. 10473

-1-

Consolidated appeals from two trials. In the first trial (# 10215), Pendleton was convicted of statutory rape (Penal Code, § 261, subd. 1) and possession of marijuana (Health & Saf.Code, § 11530). The issue is whether People v. Dorado, 62 Cal.2d 338, was violated.

A 17-year-old girl complained to police that she and Pendleton had had sexual intercourse after he had given her narcotics at a motel. Officer Vernon went to Pendleton's apartment and arrested him for statutory rape and furnishing narcotics to minors. A female co-occupant of the apartment was permitted to use the bathroom. When she came out, the officers noted the bathroom window, which had been closed, was wide open. They searched under the window and found a package containing four marijuana cigarettes. Pendleton was confronted with the four cigarettes and asked if they were his or the woman's. He replied, "I will take the beef, they are mine." The officer said "I didn't ask you that, I asked you whose are they?" Pendleton again stated "I will take the beef, they are mine." Since the officer's suspicions had been aroused by the woman's conduct, we think that the questions were legitimate investigatory questions designed to discover which person owned the marijuana cigarettes. At that time the finger of suspicion pointed to the woman, not to Pendleton. Since the questioning was investigatory questioning at the scene, Dorado is inapplicable.

An hour later, Pendleton was questioned at the police

station. The record does not indicate whether Pendleton had been formally charged or booked at this time. Pendleton again stated that the four marijuana cigarettes found during the search of the apartment belonged to him, not to the woman in the room. Respondent contends that even if the accusatory stage had been reached, the confession merely duplicated the earlier confession made during the investigatory stage, the error was harmless, and automatic reversal is not required. (People v. Jacobson, 63 A.C. 335, 347; People v. Cotter, 63 A.C. 404, 416.) The Cotter test for required reversal is whether there is any reasonable probability that the illegally-obtained confession contributed to the conviction. (63 A.C. at 416.) Here, as in Cotter and Jacobson, the later illegal confession duplicated the earlier legal confession, and its introduction into evidence was cumulative. (People v. Boyden, 237 A.C.A. 821, 825; People v. Martinez, 239 A.C.A. 176, 189-190.) The error, if any, was harmless. (Calif. Const., Art. VI, § 4 1/2; Penal Code, § 1404.)

During the same conversation Pendleton said he knew the complaining witness was under eighteen and he had had intercourse with her. These statements constituted a confession of statutory rape, but the record does not clearly indicate the length and circumstances of the interrogation, the questions asked, and other information necessary to decide whether the accusatory stage had matured under the objective test of People v. Stewart, 62 Cal.2d 571, 579 [cert. granted]

"However, since this case was tried prior to [the Dorado and Stewart] decisions, the record, quite naturally, is very terse and indefinite with respect to such aspects of the case which now have become vital in the application of these new rules." (People v. North, 233 Cal.App.2d 884, 887.) The proper procedure is to reverse the statutory rape count in order that factors relevant to the application of Dorado and Stewart may be further developed. (People v. North, 233 Cal.App.2d 884, 887-888.)

In the second appeal (# 10473), search and seizure issues are presented. Pendleton was convicted of possession of marijuana for sale (Health & Saf.Code, § 11530.5) and possession of marijuana (Health & Safe.Code, § 11530). While Pendleton was in custody on the earlier charges, he had told Officer Burke he had been selling large quantities of marijuana in the Watts area. Pendleton's girl friend had also told the officer she had seen Pendleton with large quantities of marijuana. Three weeks later, Officer Burke parked outside Pendleton's apartment house and observed Pendleton and co-defendant Hampton drive into the driveway. The officers did not know who owned the car but Hampton was driving. The officers identified themselves and asked Pendleton, "Do you have any narcotics on you or in the car?" Pendleton replied "No. Go ahead and look." Hampton remained silent. The officers searched the car and found about three-quarters of a pound of marijuana. Both defendants were then arrested.

ACB

Pendleton contends there was no probable cause for the arrest because the consent to search the car was not given voluntarily. He argues it was involuntary because he submitted to the authority of the officers "under great pressure." This contention is without merit. The question of consent is basically a question of fact to be determined by the trial court. (People v. Shelton, 60 Cal.2d 740, 746; Castaneda v. Superior Court, 59 Cal.2d 439, 442; People v. Cason, 184 Cal. App.2d 489, 494.) The trial court found the consent was voluntary, taking into account the fact that Pendleton was not under arrest (Castaneda v. Superior Court, 59 Cal.2d 439, 443), that the officers had the right to interview suspects (People v. Michael, 45 Cal.2d 751, 754), and that the officers did not assert any right to search the car (People v. Michael, 45 Cal.2d 751, 754). No doubt the defendant was somewhat nervous, since he found himself talking to the police while in the act of transporting a bulk package of marijuana, but this is hardly enough to sustain a claim of actual or implied assertion of authority to search by the police.

Pendleton suggests he did not have authority to give the officers permission to search a car which did not belong to him. In the usual case the person purporting to authorize the search is a third person, not the defendant, and the issue is one of the extent to which a third person without actual authority can waive the constitutional rights of a defendant by giving consent to a search. (People v. Cruz, 61 Cal.2d

861, 866-867; People v. Gorg, 45 Cal.2d 776, 783; Pollicki v. Superior Court, 57 Cal.2d 602, 607-608 [collecting cases].) In this case, however, the defendant is attacking the validity of his own consent by asserting his own lack of authority to authorize a search of the car. The distinction carries a difference, because in this case the defendant personally consented to the search, while in the usual case a defendant has not. His personal consent voluntarily given is sufficient authority to validate the search insofar as it relates to him. Even if Pendleton did not have authority to consent to an invasion of the constitutional rights of his codefendant and the search was illegal as to the codefendant, an issue which we need not decide,¹ the search was legal as to Pendleton, and the evidence discovered as a result of the search could be used against him. (People v. Campos, 184 Cal.App.2d 489, 494; People v. Silva, 140 Cal.App.2d 791, 794-795; People v. Ransome, 180 Cal.App.2d 140, 145-146.)

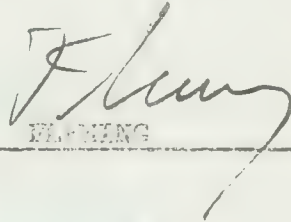
Following the arrests codefendant Hampton directed the officers to a garage where more marijuana was kept. Officer Burke testified he looked in the window of the garage and saw marijuana on a table five feet from the window. It is settled that no illegal entry or search is involved when

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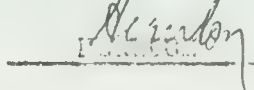
Since the codefendant did not object to the search, this in itself was evidence that he also acquiesced. (People v. Smith, 210 Cal.App.2d 232, 256.)

contraband is plainly visible to anyone looking in a window.
(People v. Martin, 45 Cal.2d 755, 762; People v. Terry, 61
Cal.2d 137, 152; Bielicki v. Superior Court, 57 Cal.2d 602,
607.)

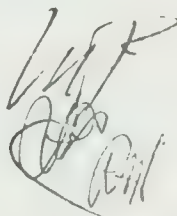
The conviction for statutory rape is reversed.
The two convictions for possession of marijuana and the
conviction for possession of marijuana for sale are
affirmed.


FLEMING, J.

We concur:


_____, P. J.

_____, J.

THE COURT: This opinion is not for publication pursuant to
the provisions of Rule 976, California Rules of
Court.



No. 22,464

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ELECTROMECH DESIGN AND DEVELOPMENT
Co., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION
TO ENFORCE A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE PETITIONER

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FILED

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No. 22,464

IN THE

United States Court of Appeals
For the Ninth Circuit

ELECTROMECH DESIGN AND DEVELOPMENT
Co., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION
TO ENFORCE A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE PETITIONER

JURISDICTION.

This case is before the Court upon petition of Electromec Design and Development Co., Inc., for review of a Decision and Order of the National Labor Relations Board issued on December 8, 1967, in Case No. 20-CA-4268. (R. pp. 145-154).¹ In its answer the Board has requested enforcement of its Order. (R. pp. 158-160). The Board's Decision and Order are reported at 168 NLRB 107.

The Petitioner, as an aggrieved person, invokes jurisdiction of this Court to review the Board's Decision and Order, and to deny enforcement of the Board's Order. This Court has jurisdiction of the proceeding under Section 10(f) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 160(f))², the events out of which this case arose having occurred in the State of California, within this judicial circuit.

¹ References to the pleadings reproduced as "Volume I, Transcript of Record" are designated "R". References to portions of the stenographic transcript of the hearing before the Trial Examiner of the National Labor Relations Board reproduced as "Volume II, Transcript of Record" are designated "Tr."

² Hereinafter referred to as the "Act".

STATEMENT OF THE CASE.

A. Statement of the Facts.

Electromec Design and Development Co., Inc., the Petitioner in this case (hereinafter referred to as "Electromec"), engages in subcontract production work for IBM, in addition to a number of other related activities. This production work is accomplished at the metal shop at Electromec's Santa Clara, California plant.

The employees discharged, Robert G. Saxer, Wilfred F. Gilbert, Dave J. Mooney, and Charles C. Pickelman, Jr. (hereinafter referred to by their last names), were employed on the IBM subcontract at the time of their discharge on October 10, 1966, as tool and die makers.

Where reference to individuals is made herein they will be referred to by their last names, after initial full name identification.

The Independent Craftsmen, Tool & Die Makers lost a Board supervised election at Electromec in February, 1966.

David Russell and James Bates were the only two men known to Electromec to have instituted the union election.

Russell voluntarily terminated his employment in the summer of 1966.

Bates was one of the men who walked off the job on October 8, 1966, was not discharged, and is still employed at Electromec.

Shortly before Easter of 1966, Pickelman requested a meeting with management regarding an additional paid holiday. He got the meeting and the men received Good Friday as an additional paid holiday.

In mid 1966, it was apparent to Electromec that tool and die makers were over qualified for the repetitive production work required by the particular sub-contract on which the four discharged tool and die makers were employed.

Management made the decision at that time that since the tool and die makers had done a good job at Electromec they would not be terminated. However, no more tool and die makers would be hired as normal attrition occurred (such as the voluntary termination of Russell, a tool and die maker).

On September 21, 1966, a meeting with management occurred at the request of the employees of the metal shop. At that meeting five points were raised: (1) a 2 week paid vacation after 1 year of employment, (2) improved hospitalization, (3) sick leave, (4) modification of the rule requiring employees to work the day before and after a holiday to be eligible for holiday pay, (5) overtime pay for Saturday work.

Management responded to the five issues as follows: (1) a 2 week paid vacation would be granted after three years of employment, (2) Electromec was then engaged in improving hospitalization benefits, (3) Electromec did not have the large cost plus contracts of some major companies and simply could not afford sick leave, (4) Electromec's obligations to IBM re-

quired enforcement of the work before and after a holiday rule to avoid absenteeism, but a doctor's certificate for an absence would permit an employee to draw holiday pay, (5) the men were then drawing overtime pay for Friday; IBM required that the first day of the work week be Saturday.

Following the September 21st meeting there was no unrest among the employees that was apparent to management.

On Saturday morning, October 8, 1966, Saxer requested a raise in pay from Carl Porschein, the shop manager. The raise was refused. He then told Porschein he was terminating effective the following Friday.

At different times during the morning of October 8th, Saxer, Gilbert, Mooney and Pickelman asked for and received permission to take the afternoon off.

Electromec's policy was to permit a limited number of men to take off Saturday afternoon, recognizing that the men had been working long hours for some period of time, so long as the basic production schedule was not effected. Shortly before the normal lunch break time on October 8th, ten of the employees in the metal shop lined up at the time clock to punch out. When Carl Porschein asked what was going on the only response from one man was to the effect that he couldn't talk to him.

The ten men left the job. The IBM representative on the job contacted Fred A. Vasta, Vice President of Electromec. On Sunday, October 9th, telephone con-

tact with five of the men who had walked off the job was made. Each of them gave a different reason for leaving.

On Monday morning, October 10, 1966, three of the four tool and die makers who were discharged were called into a meeting with Electromec's President, Joseph P. Padgett, Jr. Mooney did not report for work at the regular time on that morning.

Just prior to the meeting, Padgett learned that Saxer had voluntarily terminated his employment effective the following Friday.

Padgett informed Saxer that his resignation was accepted, effective immediately, and that he would be paid through noon that day.

Padgett then asked Gilbert his reason for leaving the job on Saturday. Gilbert replied that his wife had high blood pressure and he felt that he should go home to check on her.

Padgett next asked Pickelman his reason for leaving and was informed that he was just tired and wanted the day off.

Padgett then informed the men that he was offering them an opportunity to express an honest opinion and reason for leaving, they had not done so and he was then terminating them.

The four men who had requested and received permission to take the afternoon off, Saxer, Gilbert, Mooney and Pickelman, were discharged on Monday, October 10, 1966.

At no time before, during, or after the walkout was Electromec given a reason for the men leaving the job.

The termination notices for the four men stated that their services as tool and die makers were no longer required.

The Board filed its charge on October 10, 1966.

After the case was at issue, on March 17, 1967, Electromec's counsel filed application to take the depositions of Saxer, Gilbert, Mooney and Pickelman. On March 27, 1967, the Division of Trial Examiners of the Board denied the application. The application was made in exact compliance with Section 102.34 of the Rules and Regulations of the Board as revised on January 1, 1965.

On April 4, 1967, when the case was called for hearing counsel for Electromec renewed the application to take depositions. This application was denied.

The case proceeded to hearing, was argued in writing by both sides, and submitted for decision.

On July 24, 1967, the Trial Examiner found that Electromec had not violated Section 8(a)(1) of the Act by discharging Saxer, Gilbert, Mooney or Pickelman and recommended that the complaint be dismissed in its entirety.

On December 8, 1967, the Board adopted the Trial Examiner's subsidiary findings but reversed the basic conclusion of law of the Trial Examiner and held that the discharges violated Section 8(a)(1) of the Act.

This petition for review of Decision and Order followed.

B. Questions Presented.

1. May the Division of Trial Examiners deny an employer the right to take the depositions of complaining employees when counsel has proceeded in precise compliance with the Board's own rules regarding depositions, to wit: Section 102.34 of the Rules and Regulations of the Board as revised on January 1, 1965?

2. Is an employer required to guess at the purpose of a concerted activity or do the employees have a duty to bring home to the employer the purpose of the walkout?

3. Assuming the walkout was a concerted activity, can the four discharged employees be treated legally as having participated in that activity when they had previously requested and been given permission to leave at the time that the walkout occurred.

4. Do employees have the right to walk out and return at their whim so as to interfere with the efficient operation of the employer's business during working hours?

5. Is an employer required to accept the precise terms of an employee's notice of termination, or may the employer act on the voluntary termination by effecting it at an earlier date?

6. In determining the issue of the employer's state of mind as to an allegedly discriminatory discharge should the Board consider the uncontradicted evidence of the good labor relations at the employer's place of

business, and the employer's refusal to retaliate against one of the men participating in the walkout who had previously instituted a union election?

7. Under all the facts and circumstances of this case has the employer violated Section 8(a)(1) of the Act in discharging Saxer, Gilbert, Mooney and Pickelman?

SPECIFICATION OF ERRORS.

1. The Division of Trial Examiners erred initially in denying discovery to Petitioner under Section 102.34 of the Rules and Regulations of the Board. The Trial Examiner erred in refusing Petitioner's application, at the commencement of trial, for discovery. The Board erred in finding no prejudicial error in the Division of Trial Examiners' and the Trial Examiner's rulings denying Petitioner the right to take depositions.

2. The Board erred in finding that the Petitioner knew or should have known that this was a protected concerted activity.

3. The Board erred in describing a walkout, occurring without notice, and without a stated purpose before, during, or after the occurrence as a "strike."

4. The Board erred in finding that the four discharged employees were entitled to the protection of the Act when they removed themselves as legal participants in the walkout by requesting and receiving permission to leave.

5. The Board erred in finding that Saxer's voluntary termination, accelerated by the employer, constituted a discriminatory discharge.

6. The Board erred in failing to consider the good labor relations of Petitioner and its lack of retaliation against Bates (who had been instrumental in an earlier union election) as evidence bearing on the employer's motive.

7. The findings of the Board with respect to questions of fact are not supported by substantial evidence on the record, considered as a whole.

8. The Board erred in reversing the decision of the Trial Examiner by finding that the walkout was a protected concerted activity.

9. The Board erred in finding that Petitioner had violated Section 8(a)(1) of the Act.

ARGUMENT.

I.

INTRODUCTION.

Petitioner has stated the facts essentially in chronological order as they occurred.

This argument is addressed to the questions presented and the errors committed essentially in the order of reference under "Questions Presented" and "Specification of Errors." No relative order of importance is intended, since a number of the issues and errors are inextricably intertwined. However, Petitioner considers the constitutional issue of denial of procedural due process of law to be of the utmost importance in this case.

The Trial Examiner found that there was no protected concerted activity because there was no protected purpose for the walkout. The Board rather summarily reversed the Trial Examiner on this point, hypothesizing its own reasons for the walkout. Obviously, this is a key issue in the case and will be discussed immediately after the due process issue.

Additionally, Petitioner believes that the uncontradicted evidence compels a holding that it has not violated Section 8(a)(1) of the Act on a number of other grounds which the Board did not see fit to pass upon in its Order and Decision.

The topical headings under the argument section of this brief are phrased differently but relate essentially

to the same points as "Questions Presented" and "Specification of Errors," although not necessarily in the precise order of the questions and errors previously enumerated.

The Board has misstated the evidence directly or by implication in certain instances. Those instances will be referred to herein as the argument requires.

Petitioner submitted a fifty-two page brief in opposition to the General Counsel's brief in support of exceptions. The length of Petitioner's brief to the Board was necessitated by the specification of twenty-three exceptions to the Trial Examiner's decision and a continuing distortion and misstatement of the facts by the General Counsel in that brief in support of exceptions.

Electromec is a company that has never before been involved in an unfair labor practice charge. Counsel for this company does not practice extensively in this field. Accordingly, the expectations of Petitioner and counsel may be somewhat naive. However, it does not seem unreasonable to Petitioner to expect at least some consideration of its legal position by the Board.

Having submitted a fifty-two page brief, it is somewhat disillusioning to find not one single reference in the Decision and Order to a case cited by Petitioner in its brief. A bare reference to the points raised by Petitioner would be some evidence that its position was at least considered by the Board. The Decision and Order is essentially bereft of such reference.

II.

THE DIVISION OF TRIAL EXAMINERS' REFUSAL TO PERMIT THE TAKING OF DEPOSITIONS AND THE REFUSAL OF THE TRIAL EXAMINER TO PERMIT THE TAKING OF DEPOSITIONS CONSTITUTED A DENIAL OF DUE PROCESS OF LAW TO PETITIONER.

Petitioner's application to take depositions (R. pp. 13-14) and the Division of Trial Examiner's denial of that application (R. p. 16) constitute the basic facts here. Petitioner renewed the application when the case was called for hearing and the Trial Examiner denied this application (Tr. p. 7, lines 10-20). Petitioner raised the constitutional issue in its written argument to the Trial Examiner. Since the Trial Examiner found that Petitioner had not violated the Act, the ruling regarding the application to take depositions was at that point academic. Petitioner's brief to the Board stated (R. p. 126) that the constitutional issue was not waived and included as Appendix IV a verbatim extract from its written argument to the Trial Examiner on this issue.

As with practically every other point raised by the Petitioner, the Board did not see fit, in its Decision and Order, to even make reference to this most important issue.

In the interest of brevity, and since Petitioner's argument to the Trial Examiner on this point is part of this record (R. pp. 143-144), Petitioner simply refers here to that part of the record.

Additionally, Petitioner cites *N.L.R.B. v. Globe Wireless Ltd.*, 193 F. 2d 748 (1951) at page 751, where the Court stated:

“There is no provision in the Act authorizing the use of the discovery procedure.”

The purpose in citing this decision is because of its specifically stated reason for denying discovery.

As of the date of Petitioner's application to take depositions the Board's own rules did include provisions for taking depositions and these provisions were followed precisely.

There is no good purpose to be served here (as was stated to the Trial Examiner) in belaboring this Court with countless authorities on the procedural due process issue. The issue is framed factually and legally as sharply in this case as it will ever be.

However, it is appropriate to examine the practical effect if depositions had been permitted in this case.

The key factual issue was what motivated the employees in walking off the job. If the depositions had been permitted, Electromec would then have had an opportunity to adduce the evidence which would have conclusively demonstrated that the men knew that Saxer had already voluntarily terminated and (as the Trial Examiner postulated (R. p. 29, lines 25-28)) it was then too late to support a wage demand. Electromec would have adduced the specific evidence that the men considered the issues raised at the September 21st meeting a closed issue, except for the increased

hospitalization benefits which were forthcoming. Electromec would have adduced the evidence that Saxer did not do all of the things he claimed, and which the Trial Examiner obviously did not credit (R. p. 28, lines 46-50). Electromec would have adduced the evidence that the other men in the shop did not know that their four "leaders" had already protected themselves by obtaining permission to leave early. Electromec would have adduced the evidence that, in all probability, the walkout was motivated purely and simply by a desire to retaliate against Porschein, inspired by an admitted malcontent. The Trial Examiner, in the absence of evidence which Electromec was effectively precluded from discovering, is again forced to hypothesize but it seems rather clear that this is the conclusion he reached as the trier of fact (R. p. 30, lines 2-11).

In addition to the absolutely basic constitutional issue here, it is clear that the refusal to permit discovery had very practical consequences. Given the opportunity to gather the evidence and present it, Electromec would have received the Trial Examiner's decision in most emphatic terms. It seems unlikely that the General Counsel would have excepted to his decision, and this case would not be before this Court now, adding its weight to an ever growing volume of petitions to review and enforce decisions and orders of the Board.

III

THE BOARD DISREGARDED THE EVIDENCE AND THE FINDINGS OF THE TRIAL EXAMINER IN FINDING A PROTECTED PURPOSE FOR THE WALKOUT.

The Trial Examiner, having heard the witnesses, specifically stated that even if Saxer's testimony (concerning getting "the guys in kind of an uproar") was true "management was unaware of any turmoil" after September 21 and before October 8, 1966 (R. p. 22, line 60). This inescapable conclusion was based in part on Porschein's testimony (Tr. p. 150, lines 16-19):

Q. After the meeting in September with Mr. Padgett and up until the morning of October 8th, were you aware of any labor strike turmoil problems, anything of that nature?

A. No.

Additionally, the Trial Examiner pointed out that "No one other than Saxer testified that he had talked to management about a wage increase in this period of time" (R. p. 22, lines 60-62).

Porschein was with the men on a continuing basis, and naturally the Trial Examiner would consider and refer to his testimony as being perhaps the most probative on the question of whether there was any turmoil in the shop between September 21 and October 8, 1966.

On the other hand the knowledge and motivation of Padgett, the President of this corporate Petitioner, is, of course, most relevant. Padgett's testimony on this point was as follows (Tr. p. 96, lines 3-11):

Q. (Mr. Hofvendahl) Between this date or these dates of these meetings, Mr. Padgett, and October 8, 1966, were you aware personally of any labor difficulties, problems or strikes in the metal shop?

A. No, I wasn't. I had the feeling myself that these men were waiting for me to get back with them. I told them I would, as soon as I had definite information on our insurance coverage, and costs, I would call them in and discuss it again.

It is almost inconceivable to Petitioner that the Board, acting as an appellate tribunal, can state in the face of this unequivocal evidence that "a preponderance of the evidence establishes that the walkout was a manifestation of the general dissatisfaction among machine shop personnel as to the failure of management to accede to their demands." (R. p. 145, lines 15-17).

Porschein testified (under cross-examination) that he had absolutely no idea why the men walked off the job, but in retrospect he concluded that it was probably because they were mad at him for not giving Saxer a raise (Tr. p. 170, lines 23-25; p. 171, lines 1-25):

Q. You have testified that you had no idea why the employees left work on Saturday, October 8th?

A. At the time they left, no, sir.

Q. When did you get an indication? When did you think you knew why they left?

A. Well, after everything happened, after Monday, I certainly had to look back and try and figure out what had happened, and in the ensuing weeks I talked to other people.

Q. What was your conclusion?

A. The only thing I could conclude, the only contact I had with a man was Bob Saxer that morning as far as one of my employees or anyone having any reason.

Q. What was your conclusion why they walked off?

A. That they were mad at me because I was late in letting Bob go.

TRIAL EXAMINER: Late in letting him go? I don't quite understand.

THE WITNESS: He had requested a raise and I had told him no, not in the immediate future, and he said he was going to quit, and I didn't make him stay, by any means.

Q. (By Mr. Friedman) So you feel that they were walking off because Bob Saxer didn't get his raise?

A. I don't know, but that is the only thing I could assume could be the reason. I had no other contact, personnel contact with any of the people, during that day.

Q. Would you read this sentence from your affidavit?

A. "I feel they were walking off because I did not give Saxer a raise he asked for."

As the Trial Examiner pointed out (R. p. 30, lines 4-11), concerted activity which is motivated by a desire to retaliate against a supervisor or embarrass an employer is not the type of activity which deserves the protection of the Act.

The Board's Decision and Order states that "On October 8, when the futility of their efforts was again

demonstrated by the denial of a wage increase to their spokesman Saxer, they elected to walk out.” (R. p. 149, lines 24-26). As the Board’s own Decision and Order demonstrates (R. p. 146), increased wages formed no part of the five points presented to management at the September 21st meeting. Yet, by implication, the Board infers that the October 8th refusal to raise Saxer’s wages is directly related to the September 21st meeting. The Board finds significance in the fact that the “walkout occurred on a Saturday, Respondent’s failure to provide overtime pay for Saturday work had been one of the major complaints pressed, without success, by the employees” (R. p. 149, lines 27-29). The clear implication here is that these employees were being forced to work a six day week without overtime.

Padgett testified directly and unequivocally that IBM, for who the work was performed, required that Saturday be the first day of the work week (Tr. p. 94, lines 23-25; p. 95, lines 1-12) :

Q. Was there a discussion about time and a half on Saturday?

A. Yes, we discussed time and a half on Saturday and I outlined to them that our work week had to conform to our client’s work week and that their work week was their Saturday to Friday and the client was IBM and they felt that they had more flexibility in the work week of this nature, and whether they offered us any explanation or not of why they had this, we said we would abide by that work week.

Q. Did you also point out that the men were getting time and a half for Friday?

A. Yes, time and a half, anything in excess of eight hours in any one day, also time and a half for Friday, also anything over 40 hours. I think at that time I elaborated to the point that if a holiday fell within the work week it was not a 40-hour week, a 40-hour work week, but a 32-hour work week.

It is assumed that not even the Board requires Electromec to pay their employees time and a half after four days. Certainly it is less than fair to this Petitioner to disregard the evidence and distort the record in this manner.

It seems to Petitioner that perhaps the most succinct and basic explanation of what occurred here is provided by the Trial Examiner's quotation of a portion of Porschein's testimony (R. p. 27, lines 23-24) to wit: "Well, Dave, we can't have everyone going home at noon every time somebody quits."

The Trial Examiner cited *N.L.R.B. v. Ford Radio & Mica Corporation*, 258 F. 2d 457 (1958) at page 465 (R. p. 29, lines 45-49) as follows:

"However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they chose (sic) to remain silent, bear the risk of being discharged."

Certainly, justice and equity compels a decision in this case that Electromec has not violated Section 8(a)(1) of the Act.

Included in the rather limited number of authorities cited in the Decision and Order is *Indiana Gear Works v. N.L.R.B.*, 371 F. 2d 273 (1967) wherein the Court reversed the Board's finding that the employer had been guilty of a discriminatory discharge. The Court, at page 275, quotes the language of a Supreme Court decision which is particularly relevant to the course of this proceeding as follows:

"In a case like this where the Board has brushed aside the findings of the Trial Examiner, it is well to again consider the teachings of the landmark case of *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. The decision in that case has been quoted often in cases where the facts are somewhat similar to those in the case at bar.

In *Universal Camera*, the Supreme Court stated that the findings of the Labor Board must be supported by substantial evidence on the record considered as a whole; that the findings of the Trial Examiner are a part of that record; and that evidence supporting a conclusion may be less substantial when an experienced Examiner, reaches a conclusion contrary to that reached by the Board, and that this is particularly true when the credibility of witnesses is involved."

It is submitted that the Trial Examiner's finding that the walkout was not a protected concerted activity is supported by substantial evidence on the record, considered as a whole, and the Board's reversal of this finding is not so supported.

IV.

SAXER, GILBERT, MOONEY AND PICKELMAN REMOVED THEMSELVES FROM THE PROTECTION OF THE ACT BY REQUESTING AND RECEIVING PERMISSION TO LEAVE AT NOON ON OCTOBER 8, 1966.

At various times during the morning of Saturday, October 8, 1966, the four discharged employees requested and received permission to take the afternoon off. As the Trial Examiner pointed out in his Decision (R. p. 24, lines 10-18), Petitioner's policy in this connection was reasonable.

The evidence is uncontradicted that the four men received permission to leave early. The evidence is equally uncontradicted that they were part of the group who punched out at the same time.

It is Petitioner's position that the permission granted did have a legal effect as far as these particular individuals were concerned. Briefly stated, how could these four men be engaged in concerted activity against Electromec by doing the very same thing they had permission to do?

Petitioner can understand the Trial Examiner's comments in this connection, and clearly is not urging a mere quibble on this Court.

On the morning that the men were discharged, when two of them repeated their ostensible reasons for taking the afternoon off, Padgett told them clearly, "I am

offering you men the opportunity to express an honest opinion and reason for leaving. These reasons do not hold water as far as I am concerned. It is my decision to terminate you immediately." (Tr. p. 102, lines 16-19). This evidence is clear and uncontradicted, and neither the employees nor employer were then being advised by counsel.

The distinction should be clearly drawn between Padgett's factual response to the walkout, and counsel's analysis of the legal effect of the permission to leave.

It was very clear to Padgett that these four men had participated in a disruption of the production schedule in the metal shop. It was equally clear that they had not given management their true reasons (whatever they were) before, during, or at any time after the walkout, including this one last opportunity.

Certainly Electromec is not required to continue the employment of men who are dishonest with the company and dishonest with their fellow employees. Since these four men were also tool and die makers, overpaid for the work they were doing, continued on the payroll by Padgett's decision in recognizing the good job they had previously done, this was stated as the reason for their termination. This stated reason for termination was fairer to them than they deserved, and was definitely a factor in the decision to discharge them.

The Board's Decision and Order (R. p. 151, footnote 6) refers to the fact that Petitioner no longer required the higher skills of tool and die makers. The footnote

would have been replaced only as normal attrition occurred. The facts were presented by Electromec at the hearing and not as the Board implies in its Decision and Order.

The argument under this topical heading is a rather graphic illustration of the observation previously made that many of these points are inextricably intertwined.

The Trial Examiner did not agree with Electromec's position on this point of these four men being severed from the concerted activity, but at least he stated his reasons for disagreement. The Board simply attached "no significance" to his finding in that regard (R. p. 147, p. 147, footnote 2).

As far as Petitioner has been able to determine this is a case of first impression on this point.

For the convenience of this Court, Petitioner will repeat a portion of its brief to the Board, in a somewhat shortened form, dealing with this issue.

As to Saxer, Gilbert, Mooney and Pickelman, it is most emphatically urged that these particular men cannot have it both ways. If they requested permission to take off, respectively, because "I felt like going home" (Saxer, Tr. p. 23, lines 18-20), "to check on my wife" (Gilbert, Tr. p. 67, line 10), to "go home after five hours of work" (Mooney, Tr. p. 54, line 4), "I just asked him if it would be all right" (Pickelman, Tr. p. 43, lines 9-10), they certainly were not taking part in concerted action.

By receiving permission they effectively separated themselves from the other men in the metal shop. If there was legally concerted action here, it was not participated in by these men who had management's permission to leave.

The balance of the men in the metal shop were not terminated and these were the only men, on the basis of this record, who could contend that they were participating in concerted action.

With reference to the Trial Examiner's statement (R. p. 27, lines 46-55; p, 28, lines 1-4), obviously each of these four men affirmatively requested permission to leave. Therefore, Electromec certainly practiced no deception on these men and clearly did not lead them to leave early. These were their own acts. Purely as a factual hypothesis, Electromec disagrees with the Trial Examiner's analysis.

On the basis of their own testimony, they did agree with the other men to walk out. However, these four did something the others did not do. They asked and received permission from management to leave early. As the Trial Examiner stated in the Decision (R. p. 24, lines 14-18), "It is also apparent that the Respondent probably would not have found fault if only three of the employees had gone home early."

As of that point, in time, these four men apparently believed they really had things under control. They were going to walk out to wake up or shake up management (without of course telling management why).

However, these "leaders" did not have the fortitude to tell management about their alleged grievances, and they did not have the honesty to tell their fellow workers they had permission to leave, or to tell the company what was actually happening.

It does indeed seem to Electromec that they cannot have it both ways. If they received permission to leave, this placed them in a particular position under the Act based on their own affirmative conduct in seeking that permission. If the walkout was concerted activity, but they were relying on the permission granted to leave early they were not walking out, they were leaving with the permission of management. Therefore, these four men simply were not *legally* a part of the concerted activity.

Electromec again reiterates that as of October 10, 1966, management was well satisfied that these men were not playing fair either with the company or their fellow employees. However, this legal argument is not a mere legalistic exercise. These four men were the ones who affirmatively placed themselves in the position of having permission to leave. Having placed themselves in that position, it is submitted that they cannot be held to have participated in concerted action consisting of a group leaving work early.

V.

THE WALKOUT WAS NOT A STRIKE; IT WAS AN INTERFERENCE WITH THE EFFICIENT OPERATION OF PETITIONER'S BUSINESS AND CONSTITUTED IN AND OF ITSELF CAUSE FOR DISCHARGE.

This point was covered in detail in the written argument to the Trial Examiner. Since the Trial Examiner found no protected purpose for the walkout, he found that Electromec "discharged the four men for engaging in unprotected concerted activity." (R. p. 31, lines 1-2). Petitioner concludes that since the Trial Examiner recommended dismissal of the complaint in its entirety he did not deem it necessary to deal with this issue precisely in the form presented by Petitioner in its written argument.

In its brief to the Board, Petitioner stated (R. p. 126) that it was not waiving the issue of non-protection of activities during working hours which disturbed the efficient operation of the employer's business. However, the written argument to the Trial Examiner was included in the brief as Appendix III (in the same manner that the due process issue was included as Appendix IV). Certainly if the Board had followed the Trial Examiner's recommendation, there would have been no necessity to refer to this point in the Decision and Order.

However, when the Board disregards the Trial Examiner's recommendation, Petitioner believes that it is entitled to at least some slight indication that this

basic substantive defense has been in some manner considered by the Board.

Petitioner quoted a portion of its written argument to the Trial Examiner in its brief to the Board (R. p. 105, lines 12-21) :

“Without the benefit of discovery Electromec did not know until the trial what actually went on in the metal shop on Saturday morning, October 8, 1966. There is no reason to doubt the testimony of the witnesses in this connection, and it would be an insult to the intelligence of the Trial Examiner to contend that the walkout was not a concerted activity.”

Clearly, as demonstrated by the excerpt from the written argument to the Trial Examiner quoted above, it would be an insult to the intelligence of the Trial Examiner to contend that this was not concerted activity, and Electromec has never so contended. Electromec contended at the hearing, contended in its brief to the Board, and contends most emphatically now that the walkout was unprotected.

The Board's citation of *Radio Station KPOL, 166 CCH N.L.R.B.*, 21, 644 (1967) illustrates this issue precisely. The Board's apparent reason for citing that case was in connection with the employer's stated reason for discharges, etc. The facts were that five employers were discharged three days after they went out on strike, and the Board quite properly held this to be a discriminatory discharge. The point in the case at bar is that these men did not strike and this was not a concerted activity such as the Septem-

ber 21st meeting with management. This was an unprotected, unexplained interference with the efficient operation of Petitioner's business during working hours.

Petitioner considers this to be one of the most important substantive issues in this case. The following is verbatim from Appendix III of Petitioner's brief to the Board.

The law is well settled that the National Labor Relations Act does not protect activities during working hours which disturb the efficient operation of the employer's business.

There are a multitude of decisions on this point but Electromec will cite only three cases. These are factually close to the case at bar, are fairly recent decisions, and illustrate particular points at issue here.

Cleaver-Brooks Mfg. Corporation, Petitioner v. National Labor Relations Board (1959) 264 F. 2d 637;

American Art Clay Company, Inc., Petitioner v. National Labor Relations Board (1964) 328 F. 2d 88;

National Labor Relations Board, Petitioner v. Blades, (1965) 344 F. 2d 998.

In *Cleaver-Brooks* the Board found that four discharged men (the same number involved in this case) engaged in a protected concerted activity which consisted of a work stoppage of about 20 to 25 minutes protesting the appointment of a new foreman. The Court set aside the Board's order.

These four men were part of a group of fifteen participating in the work stoppage. All of the men returned to work (just as all of the men reported to work at Electromec, Monday morning after a much more serious work stoppage).

In both this case and *American Art Clay*, one of the issues was whether the selection of a foreman was subject to concerted activity by employees. The general principle, subject to an exception discussed on page 90 of *American Art Clay*, is that it is not. Electromec recognizes this legal distinction from the case at bar.

However, in *Cleaver-Brooks* the Company, in deciding to lay off some men, selected these particular four because of their participation in the work stoppage and their attitude. This illustrates the fact that an employer may have more than one reason for discharging a man. In Electromec's case, these four tool and die makers had been retained on the payroll despite the fact that they were overqualified for the work. When they participated (as demonstrated by their own testimony) in an unprotected concerted activity there is no legal reason why Electromec cannot select them for termination, first, because of their participation in the disturbance of the efficient operation of the employer's business, and, second, because they were not needed as tool and die makers.

The case is cited for the close factual parallel to this case, and the emphatic statement at page 640:

“The Act does not protect activities during working hours which disturb the efficient operation of the Company’s business. *Caterpillar Tractor Co. v. N.L.R.B.*, 7 Cir., 1956, 230 F. 2d 357.”

American Art Clay involved a walkout shortly before the noon hour just as in this case. Eventually issue was joined on whether the discharge of some of the men who had walked out constituted an unfair labor practice. The Board’s order requesting enforcement was denied.

One of the principal legal issues involved was whether the employees had the right to engage in concerted activity over the selection of a foreman. This is the same legal distinction in *Cleaver-Brooks* previously acknowledged herein.

Again in this case the Court recognized the distinction between protected activity and unprotected activity, stating at pages 90 and 91.

“Prior to the date of its decision in *Dobbs Houses, Inc.*, the Board had recognized the distinction between moderate conduct as a protected activity on one hand and intemperate activities during working hours which destroy the efficient operation of an employer’s business, on the other. *Ace Handle Corp.* (1952), 100 N.L.R.B. 1279; *Wood Parts, Inc.* (1952), 101 N.L.R.B. 445; *Hearst Publishing Company, Inc.* (1955), 113 N.L.R.B. 384. In none of those cases was there a strike or walkout.”

However, there were some highly relevant factors in *American Art Clay* which made that case a much stronger one for enforcing the Board’s order (which the Court refused to do) than the instant case.

The facts in *American Art Clay* were clear that one Joe Songer stated to the assistant plant superintendent, with all of the employees assembled, that if the change in foreman was because the Company wanted more production, then the men wanted more money. There was some evidence that some employees cried out, "That's right, we're with Joe."

The majority of the Court found that "There is no evidence that Joe Songer had received any authority from the other employees to speak in their behalf." The dissenting Judge disagreed with the majority's view of the reason for the walkout, but took no exception to this statement concerning Songer's lack of authority.

Thus, in the instant case, as of the September 21st meeting, Saxer was apparently recognized as a spokesman by both management and the employees. However, there is not a scrap of evidence that there was any such spokesman as of October 8, 1966, because, indeed, no one of these men troubled themselves to inform Electromec as to why they were walking out. If by some process of inference it is found that Saxer was some sort of spokesman on October 8th he spoke for himself alone. By his own testimony he asked for a raise and when he didn't get it he voluntarily terminated his employment.

American Art Clay discusses *N.L.R.B. v. Phoenix Mut. Life Insurance Co.*, 167 F. 2d 983, at some length. In *Phoenix*, several insurance salesmen drafted a letter to management concerning the selection of a cashier. The company discharged the two salesmen

principally involved, the Board ordered their reinstatement, and the Court affirmed.

In discussing *Phoenix*, at page 90, the Court states:

“In *Phoenix* there was no walkout or strike. We emphasized the moderate conduct of the salesmen. We stated, 167 F. 2d at page 988: ‘***Conceding they had no authority to appoint a new cashier or even recommend anyone for the appointment, they had a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest. The moderate conduct of Davis and Johnson and the others bore a reasonable relation to conditions of their employment.’ ”

The conduct of the salesmen in *Phoenix* is a direct parallel to the moderate conduct of the metal shop employees at Electromec in requesting the meeting of September 21st.

The conduct of Electromec in responding, by explanation and improved hospitalization, to the views of the employees is in sharp contrast to the conduct of the employer in *Phoenix* who promptly discharged two men who wrote a letter.

If this record discloses a certain disenchantment on the part of Electromec's management with the four men here involved, the reasons are more than apparent.

Blades Manufacturing Corporation was principally concerned with the effect of the Company's conduct prior to an election, and the effect of a second election which the union won. The Court reversed the Board, held the first election valid, and found that the Company was under no duty to recognize the union.

The Court, having found that there was no union representing the employees, then addressed itself to the question of whether the employees were engaged in a protected concerted activity. Commencing at page 1004 and to the conclusion of the opinion the Court emphatically reaffirms the same principle heretofore discussed.

The walkouts in *Blades Manufacturing Corporation* were more numerous than the walkout at Electromec, which in turn was more serious than the twenty-five minute walkout in *American Art Clay* which produced the immediate discharge of the employees.

However, the principle in each case is precisely the same. At page 1005 of *Blades Manufacturing Corporation* the Court refers to the Supreme Court's view of this issue and states:

“And in *National Labor Relations Board v. Insurance Agents*, 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed. 2d 454 (1960), the Supreme Court agreed, on the basis of its *Briggs-Stratton* rationale, with the Board's argument there that a total strike is a concerted activity protected against employer interference by §§ 7 and 8(a)(1). But deliberate ‘slowdowns’ and ‘walkouts’ by the employees to exert pressure on the employer to accept the union's bargaining demands were unprotected concerted activities, and the employer was free to discharge the participating employees for their unlawful disloyal tactics.”

If the quoted language from the decision of the Supreme Court means what it clearly appears to mean, the Board's Order should be denied enforcement on this ground alone.

VI.

**PETITIONER IS NOT REQUIRED TO ACCEPT SAXER'S
VOLUNTARY TERMINATION ON HIS TERMS, BUT
MAY ACCELERATE THE VOLUNTARY TERMINA-
TION.**

The Trial Examiner found that Electromec's acceptance of Saxer's resignation as of Monday, October 10, 1966, rather than as of Friday, October 14th, was "in effect" a discharge (R. p. 31, footnote 20). The Board used the same phrase in finding that Saxer's accelerated termination was "in effect" an unlawful discharge (R. p. 148, footnote 3).

It seems to Petitioner that the position of Saxer vis a vis the other three tool and die men is so identical to theirs that the additional fact that Saxer had voluntarily resigned is not of monumental importance to the decision in this case.

However, as of the meeting on the morning of October 10th, Padgett was clearly operating under a good faith belief that an employer can accept an employee's notice of termination at the employer's option without violating any law.

There are a number of possible factual circumstances that occur to Petitioner in this connection. If Saxer had given an inordinately long notice as to his selected termination date; if he had given his notice and then simply slacked off on his work; or if, within the actual notice period, Electromec had the opportunity to replace him with a machinist—it is Petitioner's

understanding that it may select its own termination date. Obviously, and as previously covered in detail herein, it is Petitioner's contention that the effective date for Saxer's termination was accelerated for cause.

No authorities have been found on this point and none were cited by either the Trial Examiner or the Board.

However, it does seem quite clear to Petitioner that his act of voluntary resignation was one additional factor as far as Saxer was concerned. It is submitted that Electromec cannot be guilty of a discriminatory discharge in effectuating the termination of an employee three days earlier than the employee's stated notice.

VII.

**LABOR RELATIONS AT ELECTROMECC WERE GOOD
AND THERE WAS NO NECESSITY FOR THESE MEN
TO DISRUPT PRODUCTION.**

Petitioner acknowledges the basic holding of *N.L.R.B. v. Burnup & Sims*, 379 U.S. 21, 13 L. Ed. 1 (1964), cited by the Board, wherein the Supreme Court determined that the employer's motivation was immaterial if a discharged employee was acting in a protected activity.

While Petitioner might prefer the logic of Justice Holan's concurring and dissenting opinion, the majority opinion apparently represents the present state of the law on this point.

In this context, then, the history of labor relations at Electromec may not be highly relevant to a determination of this cause. It is submitted, however, that the general course of conduct of this employer in dealing with its employees does have some probative value in resolving these complex and interrelated issues.

As the Trial Examiner said (R. p. 30, lines 13-17), "I find it difficult to believe that the walkout was an expression of interest in mutual aid or protection. Never before had any of the discharges failed to speak up for changes in working conditions when they felt it in the interests of the employees to do so, least of all Saxer."

Petitioner, of course, recognizes the duty of the Regional Director of the Board to investigate any

complaint made to it. However, the operative facts here were that the office which undertook the investigation of this complaint was the same office which supervised the election for The Independent Craftsmen, Tool & Die Makers. The personnel of that office knew that Bates was one of the moving parties in obtaining that election. In the course of the investigation of the case at bar it was immediately apparent that Bates was one of the employees participating in the walkout and he was not discharged. This fact alone should have been an immediate and striking indication that this employer was not motivated by an anti-union or anti-employee bias.

The non-legal investigating personnel determined that this was obviously concerted action, and perhaps understandably did not draw the legal distinction between protected and non-protected concerted activities. However, when an experienced Trial Examiner makes the statement quoted above and recommends dismissal of the complaint in its entirety, it is submitted that the least the Board should do is consider the history and background of this particular employer before summarily disregarding the recommendation of its Trial Examiner.

The fact that the union lost a Board supervised election in February, 1966, certainly has some probative value to establish the fact that the employees were satisfied with conditions at Electromec.

Pickelman testified that he and at least one other man requested a meeting with management regarding

an Easter holiday. They got the meeting and they got the holiday. (Tr. p. 91, lines 3-19).

The five points brought up at the September 21st meeting were as follows:

1. The first day of the work week.
2. Working the day before and the day after a holiday in order to receive holiday pay.
3. Two weeks vacation with pay after one year.
4. Sick leave.
5. Increased hospitalization benefits.

The first two points are clearly prerogatives of management, but were courteously discussed with the employees. The client, IBM, required the first day of the work week to be Saturday. Management had to require that the men work the day before and the day after a holiday to avoid a high incidence of long holiday weekends interfering with production schedules. Even on this point, however, the men were told that if they produced a physician's certificate which showed a bona fide illness on the day before or the day after a holiday they would receive the holiday pay.

They were informed that two weeks vacation with pay after one year was not in the cards. They would receive two weeks vacation with pay after three years, but the Company would not object if any employee wished to take more than one week on his own time.

They were informed that Electromec did not have the large cost plus government contracts such as Lock-

heed had, for example, and simply could not afford sick leave at that time.

It was agreed that increased hospitalization benefits would be obtained, and this has since been accomplished.

When these men came to work at Electromec they either fixed their own rate of pay, in an amount satisfactory to them, by express agreement, or did so by implication by going to work at a fixed rate. Every one of them received substantial increases in relatively short periods. Mooney was increased one dollar per hour in one year.

Even when management at Electromec finally recognized that tool and die men were not required, or desirable from the Company point of view, they were not terminated. The decision was that the men would not be laid off, but would be replaced by machinists as normal turnover occurred.

At the expense of efficiency the shop manager, Porschein, specifically directed that the work would be rotated among the tool and die men to make it more interesting for them. (Tr. p. 152, lines 5-15).

There is not the slightest suggestion here that this Company did anything but consider the welfare of its employees.

Despite the holding of the Supreme Court in *Burnup & Sims* in 1964, a 1965 decision of the Board, *Invaalex Sales Co., Inc.*, 152 CCH N.L.R.B. 9354 (1965) holds:

“The discharge, however, was caused by the unauthorized departure from the plant, and was not motivated by any union or other protected activity of Amos.”

It is apparent that the motivation of the employer is indeed a factor which continues to be relevant in these cases. The background of Electromec was fully known to the Regional Director, was fully developed before the Trial Examiner, reported verbatim, and covered in detail in his decision. It is submitted that the Board should have given some weight to this evidence, a part of the record as a whole, and adopted the recommendation of the Trial Examiner to dismiss this case in its entirety.

CONCLUSION.

In addition to the misstatements by implication in the Decision and Order previously set out, there were specific misstatements of fact in the Decision and Order.

The Board states (R. p. 147, lines 2-3), "Saxer asked for a meeting with higher management. When Porschein failed to schedule a meeting" The direct testimony of Porschein in this connection (Tr. p. 148, lines 23-25; p. 149, lines 1-2) is as follows:

Q. Did the men in September, 1966, request the meeting with Mr. Padgett to you?

A. Yes.

Q. Did you arrange for that meeting?

A. Yes, I believe I did.

The direct testimony of Saxer in this connection (Tr. p. 17, lines 6-11) is as follows:

Q. After you spoke to Mr. Porschein about the meeting, what did you do?

A. I went back and told the group of people I worked with that he would set up a meeting.

Q. When was this meeting set up for?

A. The 21st of September.

The Board states (R. p. 147, lines 23-24), "Padgett, Respondent's president, learned of the walkout on Saturday evening"

The Trial Examiner stated in his decision (R. p. 24, lines 47-49), "Then, returning Walsh's call, Vasta

learned of the walkout and attempted to reach Padgett but was unsuccessful until Sunday, October 9.”

The direct testimony of Vasta in this connection (Tr. p. 207, lines 15-19) is as follows:

Q. Were you able or did you do anything in connection with this problem on that day, Saturday?

A. Yes, I tried to contact Mr. Padgett who was out of town. I learned from Mrs. Padgett that he couldn't be reached until the next morning, which was Sunday morning.

The Board states (R. p. 150, lines 19-21), “Respondent at all times was fully aware of the continuing unsatisfied demands emanating from workers in the machine shop.”

The direct and unequivocal evidence contradicting this statement in the Decision and Order has been previously set out under topical heading III of this argument, but will be repeated here.

As to the shop manager, Porschein, who had the most direct and continuing contact with the men (Tr. p. 150, lines 16-19):

Q. After the meeting in September with Mr. Padgett and up until the morning of October 8th, were you aware of any labor strike turmoil problems, anything of that nature?

A. No.

As to the president, Padgett, whose understanding is the most relevant as to any issue bearing on the knowledge of Petitioner (Tr. p. 96, lines 3-11):

Q. (Mr. Hofvendahl) Between this date or these dates of these meetings, Mr. Padgett, and October 8, 1966, were you aware personally of any labor strike difficulties, problems or strikes in the metal shop?

A. No, I wasn't. I had the feeling myself that these men were waiting for me to get back with them. I told them I would, as soon as I had definite information on our insurance coverage, and costs, I would call them in and discuss it again.

Petitioner, perhaps ingenuously, believed that the Board acted in effect as an appellate tribunal in reviewing the Trial Examiner's decision. The misstatements by implication and the specific misstatements set out do not have an overwhelming significance in the entire context of this case. However, they serve to convince Petitioner that this record was either hurriedly considered by the Board, or deliberately misconstrued against the interests of Petitioner. In either event Electromec did not obtain the fair and impartial consideration of its case to which it is entitled as a matter of justice and law.

Petitioner has previously recognized the complexity and interlinking of the issues here.

Its major contentions may be summarized as follows:

1. Petitioner was denied due process of law in the refusal to permit the taking of depositions in accordance with the precise Rules and Regulations of the Board.

2. There was no protected purpose for the walk-out as the Trial Examiner found.

3. The four discharged employees were not part of the concerted activity because they had received permission to do the very thing of which the concerted activity consisted.

4. The walkout and return on Monday morning was neither a strike, nor was it moderate concerted activity protected by the Act. It was a non-protected activity which interfered with the efficient operation of the employer's business.

For the foregoing reasons, the Decision and Order of the National Labor Relations Board should be reversed and vacated, and its Cross-Petition for Enforcement denied.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. L. HOFVENDAHL

No. 22,464

IN THE

United States Court of Appeals
For the Ninth Circuit

ELECTROMECH DESIGN AND DEVELOPMENT
Co., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION
TO ENFORCE A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION.

Pursuant to Rule 18 (4) of the Rules of this Court, Petitioner replies to Respondent's brief filed herein.

Petitioner presented seven questions and nine specifications of error in its opening brief. Respondent's brief refers only to the "Questions Presented."

However, the concluding section of Respondent's brief does separately state and argue the procedural due process issue. Additionally, by footnote reference or otherwise by unsegregated argument some of Petitioner's questions presented in its opening brief are referred to in Respondent's brief. Accordingly, this reply brief will be addressed to the arguments contained in Respondent's brief in essentially the same order as they are presented therein.

For convenient reference Petitioner will use its own topical headings to separate and describe the particular points answered in order as they are met in the body of Respondent's argument.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE.**I.**

In general, counsel's statement of the facts appears to be more accurate than the Board's decision (Petitioner's Opening Brief, pages 44-46).

However, there is no reference in Respondent's counterstatement to the fact that Bates, who was one of the men instigating the union election, walked off the job on October 8, 1966, was not discharged, and is still employed at Electromec.

There is no reference to the fact found by the Trial Examiner (R. p. 22, line 60) that "management was unaware of any turmoil" (after September 21, 1966, and before October 8, 1966).

Petitioner has stated the facts in its opening brief, Respondent has counterstated the facts in its brief. Both sides have emphasized what is deemed important to the respective positions.

Petitioner will not restate the factual issues further since the basic facts are not in dispute.

II.

The Board's reversal of the Trial Examiner in finding that the concerted activity "concerned terms and conditions of employment" and that it was protected activity is, of course, vigorously excepted to by Petitioner, since the discharged employees neither before, during, or after the walkout gave management their reasons for their actions.

RESPONDENT'S ARGUMENT.

1. Saxer's voluntary termination.

At page 12, footnote 6, of Respondent's brief a one-paragraph reference is made to the fact that Saxer's voluntary termination is of no significance to the case. At pages 37 and 38 of the opening brief Electromec stated its understanding of its rights vis-a-vis the acceptance of Saxer's notice of termination. As stated therein, no authorities have been found by Petitioner on this point and since none were cited by Respondent it would appear that this is a point of original impression. Electromec will submit this issue on the argument made in its opening brief.

2. Saxer, Gilbert, Mooney and Pickelman were not legally a part of the concerted activity.

In a continuation of footnote 6, at page 12 of Respondent's brief, the fact that the dischargees had permission to leave early is dismissed as "completely without merit."

Petitioner disagrees emphatically. A substantial portion of the opening brief (pages 22-28) was devoted to this issue.

The Trial Examiner did not agree with Electromec's argument in this connection, the Board simply attached "no significance" to his finding in that connection, and now counsel for the Board dismiss the argument summarily as completely without merit.

It is submitted that this Court will consider this issue as being completely meritorious.

Electromec finds it difficult to conceive of a factual situation, postulated in general terms in footnote 6, page 12 of Respondent's brief, wherein an employer could deprive his employees of the right to engage in protected activities "simply by sanctioning such activities." Be that as it may, the facts here are clear and uncontradicted.

Disregarding for the moment all of the legal analysis addressed to this issue, the Trial Examiner found the facts rather succinctly in his decision (R. p. 30, lines 43-45) :

"Presumably expecting that they might be suspected of leading a walkout, each of the four dischargees sought permission to leave early."

For all of the reasons stated in the opening brief (pages 22-28) Electromec again reiterates its emphatic contention that these four men cannot have it both ways. Legally they were not part of this concerted action.

3. There was no factual connection between the September 21st meeting and the October 8th walkout.

The last sentence on page 13 of Respondent's brief and the first sentence on page 14 read as follows :

"After listening to these proposals, Padgett promised some improvements in hospitalization benefits, but otherwise merely explained to the employees

why the Company was unable to grant their requests. These demands were still pending and unsatisfied when less than three weeks later — on October 8 — the employees walked out.”

Padgett may have been right or he may have been wrong in his handling of the five issues. The point is that there was no turmoil or unrest apparent to management after the September 21st meeting and prior to the October 8th walkout. The first sentence quoted above demonstrates that as far as management was concerned the meeting was a closed issue and, other than the improved hospitalization which was indeed forthcoming, there simply were no pending demands.

Respondent cites *N.L.R.B. vs. Washington Aluminum Co.*, 370 U.S. 9, 14 as authority for this distortion of the record to connect the September 21st meeting with the October 8th walkout. In that case the men walked out on a bitterly cold day, practically at the invitation of a foreman, to protest the failure of the company to provide sufficient heat in the plant. Obviously, there could be no doubt in anyone’s mind in that factual situation as to what caused the walkout. Despite the broad language used by the Supreme Court in *N.L.R.B. vs. Washington Aluminum Co.* there simply is no application of the facts of that case to the instant case.

When the employees, as here, do not before, during, or after the walkout ever tell Electromec the purpose of the walkout then, it is submitted, the holding of *N.L.R.B. vs. Ford Radio & Mica Corporation*, 285 F.2d 457 (1958) at page 465 squarely controls this issue, wherein the Court states:

“However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they chose (sic) to remain silent, bear the risk of being discharged.”

4. The employees never communicated a purpose for the walkout to Electromec.

Respondent's brief states at page 15, “The Company's contention that when it discharged these employees, it had no knowledge that they had engaged in a protected walkout is unavailing.”

This statement may be at the least puzzling for this Court since no such contention was made in Petitioner's opening brief.

Inasmuch as the Trial Examiner made reference to this point (R. p. 28, lines 13-21), as did the Board in its decision (R. p. 150, lines 18-19), Electromec will utilize this opportunity to clarify the record.

In its written argument to the Trial Examiner Electromec did indeed include a short argument under this approximate topical heading now described by Respondent as a “contention” of Electromec. Since the written arguments to the Trial Examiner were not made a part of this record on appeal, that particular part of the argument is set out here, including its topical heading, verbatim and in its entirety.

“ELECTROMECC DID NOT KNOW THAT THE EMPLOYEES WERE ENGAGED IN A PROTECTED ACTIVITY.

In his dissent in *American Art Clay* Judge Kiley states at page 92:

'The remaining issue is whether the discharge was not an unfair labor practice because the petitioner did not know and had no means of knowing that the employees were engaged in a protected activity; and that, in fact, petitioner in good faith believed that they had walked out because of the change in foreman. For this contention petitioner relies principally on *N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958).'

He then went on to state that the assistant plant superintendent knew or should have known that this was a protected activity, and the employer could not evade the act by a division of corporate functions.

This part of the dissent, incidentally, was not written in disagreement with a particular portion of the majority view. It was a statement of the law relative to Judge Kiley's opinion that this particular walkout was a protected activity.

The evidence is absolute and uncontradicted that Electromec was not informed before the walkout. On Sunday, October 9, 1966, Mr. Vasta and two personnel officers spent a substantial portion of the day on the telephone attempting to learn, without success, why the walkout occurred. Finally, on Monday morning Electromec still did not receive an explanation. Perhaps, as Mr. Gilbert testified (Rep. Tr. p. 75, lines 20-25; p. 76, lines 1-5), everything was over and done with in two hours and twenty-one minutes, and the men simply did not have time to explain.

Clearly, this case can be decided on this issue alone. The law, logic, and common consideration require that the least these men are required to do is to inform the employer as to why they are walking off the job."

Obviously, the particular language used for this topical heading in the original argument to the Trial Examiner leaves something to be desired. An adaption of the language from *N.L.R.B. vs. Ford Radio & Mica Corporation* would have been more precise, e.g., "JUSTICE AND EQUITY REQUIRE THE EMPLOYEES TO BRING HOME TO THE EMPLOYER THE PURPOSE OF THE CONCERTED ACTIVITY OR BEAR THE RISK OF BEING DISCHARGED."

It may also be said, at that relatively early stage of the proceedings, the point was raised rather indirectly by Electromec in citing *American Art Clay Company, Inc. vs. N.L.R.B.* 328 F.2d 88 in which the dissenting Judge makes only a passing reference to *N.L.R.B. vs. Ford Radio & Mica Corporation* rather than to have cited the latter case directly. However, it is perfectly apparent from a reading of this extract from the written argument that Electromec was making the particular point that the employees had the duty to inform the employer as to the purpose of the walkout. Whether or not the Trial Examiner dismissed this particular argument in terms of its topical heading he did state, just prior to the quotation from *N.L.R.B. vs. Ford Radio & Mica Corporation* in his decision (R. p. 29, lines 40-41) as follows:

"In fact there was mostly silence. All appeared inclined not to reveal any reason for the walkout."

Obviously, the Trial Examiner agreed with Petitioner on this issue.

At page 39 of the opening brief Petitioner acknowledged the holding of *N.L.R.B. vs. Burnup & Sims* 379 U.S. 21, that the employer's motivation is immaterial. Clearly, without the contention being made to this Court in the manner stated at page 15 of Respondent's brief it is something less than fair to Petitioner to raise the issue in this form now.

5. The Board did not draw contrary inferences of fact; it overruled the Trial Examiner's conclusion.

Electromec does not take issue with the decisions cited on page 16 of Respondent's brief permitting the Board to draw contrary inferences from the facts found. It will, however, refer to page 21 of the opening brief which discussed the weight due to the findings of the Trial Examiner. Again recognizing the complex and interrelated factual issues here, it is emphatically urged that the Board did not merely draw a contrary inference — it simply disregarded the findings of the Trial Examiner.

It is absolutely clear from the Trial Examiner's decision that the facts he found were that as the men punched out "All appeared inclined not to reveal any reason for the walkout" (R. p. 29, lines 40-41). That during the telephone contacts after the walkout "... not one employee gave Respondent the denial of a wage increase to Saxer as a reason for the walkout" (R. p. 29, lines 23-24) and, as to Saxer, "Saxer's professed claim to ignorance of the reason of the others in walking out suggests an intentional deceit supporting an

inference of malice" (R. p. 30, lines 22-24). Concerning the meeting in Padgett's office on October 10, 1966, the Trial Examiner devoted a substantial portion of his decision (R. p. 26, lines 15-58) to an analysis of the evidence, recognizing that the employees stated that they were not asked the reason for the walkout, whereas Padgett stated that they were. The point is that at no time, at this late date, did anyone in fact inform the employer of the purpose of the walkout.

This, of course, brings the issue squarely back to *N.L.R.B. vs. Ford Radio & Mica Corporation*. These employees chose to remain silent. The facts concerning their silence were as found by the Trial Examiner and there are no inferences, contrary or otherwise, to be drawn from these facts as to a stated purpose for the walkout.

Based on these facts the Trial Examiner, citing, *Joanna Cotton Mills vs. N.L.R.B.* 176 F.2d 749 and *N.L.R.B. vs. Ford Radio & Mica Corporation*, concluded that there was no protected purpose for the walkout. The Board did not draw a different inference of fact; it summarily over-turned the conclusion of its own Trial Examiner based on the specific facts he found.

6. The walkout, without a stated purpose, was not protected concerted activity.

Petitioner at page 36 of the opening brief (and of course raising the same point throughout the preceding section of the opening brief commencing at page 29)

quoted from a Supreme Court decision which held that a total strike was a protected activity, slowdowns and walkouts were not.

Electromec recognizes an apparent conflict in the law here. It would seem reasonable to believe that if the employees had brought home to management their particular protected purpose in walking out, as was the inescapable fact in *N.L.R.B. vs. Washington Aluminum Co.*, or had they in fact struck by walking off the job and staying off, then presumably either course of conduct would have constituted protected concerted activity. However, when they communicate no purpose for the walkout to management, and when they obviously disrupt production on a Saturday and return to work on Monday, without ever stating their purpose then, as the Trial Examiner held, this, "is certainly not the type of activity that deserves the protection of the Act." (R. p. 30, lines 10-11).

7. Denial of discovery to petitioner.

In addressing this reply brief to this important issue Electromec does so in the context of the following points:

a. The cases cited by Respondent all hold what they are represented to hold in Respondent's brief. Petitioner will not impose on this Court's time with a case by case analysis demonstrating factual distinctions.

b. The pending case is perhaps no more important to Electromec than were all of the prior cases impor-

tant to those employers denied the right of discovery. Certainly it is no less important.

c. Counsel for Petitioner herein does not consider that this issue is raised now any more eloquently or persuasively than it was undoubtedly raised by numerous counsel for employers in the past.

d. There are no special facts or circumstances in this case that make discovery more important to Electromec than it was to the prior employers denied their rights. Again, it is certainly not less important.

e. The nature of the preliminary investigation by the Board, and the interrogation of witnesses by the Board without benefit of counsel, make the availability of discovery to the employer of far greater importance in a proceeding of this nature than it is in general litigation where the denial of discovery to a litigant is legally and equitably inconceivable.

f. The Federal Judiciary has been the leader in developing a simple, efficient and just procedure for discovery, followed now by a large number of state jurisdictions. Considering the elemental requirements of justice, on the one hand, and the practical considerations of attempting to reduce the volume of Board decisions that come before this Court, on the other hand, it is time now to direct the Board to comply with its own rules.

In the opening brief Electromec cited only *N.L.R.B. vs. Globe Wireless Ltd.*, 193 F.2d 748 (1951) on this issue for the specifically stated reason for denying discovery, because there is "no provision in the Act authorizing the use of the discovery procedure."

Electromec assumed that the reference to the "Act" in the above case referred to the original Act and all of the rules and regulations of the Board adopted pursuant thereto (as distinguished from the decisions of the Board in adjudicating particular cases). If this assumption is correct then, of course, the depositions should have been permitted since the Board's own rules make specific provision therefor.

In a case cited by Respondent, *N.L.R.B. vs. Safway Steel Scaffolds Company of Georgia*, 383 F.2d 273 (1967), Judge Thornberry, for the Fifth Circuit, addressed himself to this precise point, at page 176, as follows:

"Section 10(b) of the Act would appear to give a trial examiner authority to permit the taking of depositions in any case where such a procedure would be practical:

Any such (unfair labor practice) proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, * * * 5

However, the practicality of having pretrial discovery in labor proceedings has been somewhat uncertain. In 1960, Member Jenkins submitted a committee's proposals for changes in the Board's rules and regulations. 45 L.R.R.M. 94, 101 (1960). Among other things, he noted that it would be desirable to have pretrial discovery but that it would not be feasible for trial examiners to preside over the taking of all depositions. He went on to say that there was no reason why the inability of examiners to preside should be an insuperable obstacle:

Personally, I can see no reason by such depositions could not be taken by either party as a matter of right before anyone authorized by the state or Federal government to take oaths, if some means could be devised for enforcing this right without having to resort to the tedious and time-consuming process of obtaining a court order to enforce the right of deposition.

The Board was persuaded by this comment and evidently did not visualize any real problem of enforcement; for its rules and regulations now provide a detailed procedure for the taking of depositions if in the judgment of the trial examiner good cause has been shown. NLRB: Statements of Procedure, Rules and Regulations §§ 102.30, 102.35 (Lab. Rel. Rep. LRX 4058, 4060). In light of section 10(b) and of these new rules, which were in effect when the hearing in the instant case was conducted, we must conclude that the examiner was wrong in holding that there is absolutely no provision for pretrial discovery.

5. Fed.R.Civ.P. 26-37 govern pretrial discovery in civil cases to be tried in federal district courts. Rules 26-32 set out detailed procedures for taking depositions upon oral examination and written interrogatories."

Obviously, Judge Thornberry's careful description of the chronology, commencing with a committee recommendation in 1960, demonstrates that he reached the same conclusion that Petitioner did, as set out in Petitioner's Opening Brief, pages 13-15.

N.L.R.B. vs. Safway Steel Scaffolds Company of Georgia illustrates the practical trial difficulties facing the employer who is denied the right of discovery. In commenting on the evidence at page 280, the Court stated:

“Second, it offered evidence which tended to show that Mr. Wallace could not have made the statements he allegedly made to Frank Edward Cogdel on two separate occasions in June because he was not at the plant on either of those days. The making of the statements to all employees in May and to Quincy Knox in July was denied but not effectively refuted. Although this rebuttal evidence might have led us to a different result had we been the original triers of fact, we cannot, under the substantial-evidence rule, say that the Board, following the examiner, was unreasonable in believing the employees or that its findings were not based upon such relevant evidence as a reasonable mind might except.

(12-14) Any uneasiness we might have about the credibility of Frank Edward Cogdel, the General Counsel’s principal witness, is overcome by the fact that respondent clearly violated section 8(a) (5) when it reduced wages on July 1.”

With this particular case following the normal course of an unfair labor practice hearing it is clear that counsel for the employer learned at the hearing for the first time of the statements allegedly made by Mr. Wallace. It seems to Petitioner that trial counsel must have, under pressure, accomplished an outstanding job of presenting rebuttal evidence for the Court to hold “. . . this rebuttal evidence might have led us to a different result had we been the original triers of fact . . .”

Assuming this case had gone to hearing without the objective fact of the employer’s having reduced wages on July 1, the entire thrust of the unfair labor practice charge could have depended on whether or not Mr. Wallace made the statements attributed to him. Given that assumption, and given the pre-trial discovery

which is considered an elementary and basic right in all litigation, it would appear from a reading of the opinion that employer's counsel could have so effectively presented the rebuttal evidence that there would have been no doubt in the Trial Examiner's mind. It would appear to be a reasonable assumption that this case could have ended at that level, and not have constituted one more N.L.R.B. case before a United States Court of Appeals.

Given the discovery which is normally considered such a basic element of justice, it is at least reasonable to assume that many employers might, through the medium of that discovery, learn that their own managerial personnel for whose acts and statements they are accountable have indeed been guilty of an unfair labor practice. With a reasonable period before trial to evaluate the available evidence many employers might very well elect to make their peace with the Board rather than to proceed to hearing.

Electromec finds itself in the somewhat anomalous position of having been denied its right to discovery and yet having prevailed before the Trial Examiner.

If an employer who has lost before the Trial Examiner does not prevail before the Court of Appeals because of lack of a showing of prejudice how, it may well be asked, can this employer, winning its case before the Trial Examiner, claim prejudice? The answer, of course, is that the employer goes before the Board on review of a Trial Examiner's decision with an imperfect, and incomplete, record. The employer is now bound by it and because of a denial of its right to pre-

trial discovery, and a denial of its right to effectively prepare the case for trial, that record does not adequately reflect the employer's position.

Living on the side of the angels, with all of the administrative and investigative machinery of the Board available, it is a simple matter for Respondent's counsel now to say that Electromec "could as easily" have presented this evidence. The fact is that when counsel is learning for the first time in the course of trial what the specific allegations are he simply does not have the time available to effectively present the rebuttal evidence.

Another case cited by Respondent illustrates the problem faced by the employer. *Texas Industries Inc. vs. N.L.R.B.*, 336 F.2d 128 is cited for the proposition that Electromec "could have interviewed the employees." Also, it is pointed out at page 19 of Respondent's brief, that in fact the "Company did interview employees who had participated in the walkout." *Texas Industries Inc. vs. N.L.R.B.*, at page 133, says specifically, in referring to the right to interview employees, that "The privilege, however, is a narrow one."

At the time of the walkout, and immediately following it, Electromec did indeed interview its employees. There was no pending litigation then and this employer was making a sensible effort (without success, it may be noted) to learn just what had occurred.

Interviewing employees, then, is a vastly different thing from interviewing them in the context of a pending unfair labor charge complaint. The employer

is already enmeshed and it would be something less than prudent, without having any knowledge of what the complaining witnesses contend, to embark on a blanket interrogation of the non-complaining employees, and perhaps risk additional charges by that very act.

As a matter of trial preparation it is a cart before the horse situation anyway. The employer cannot know what investigation and marshalling of the available evidence is required until, of course, he knows precisely what the contentions of the adverse parties are. These contentions are, of course, discovered and established by deposing an adverse party under oath.

As was pointed out in the opening brief (pages 14-15) there are a number of highly specific and relevant matters to which Electromec could have addressed its trial preparation had it been given the basic right of deposition discovery.

Certainly the fact of no stated purpose before, during or after the walkout could have been more effectively presented with additional evidence.

Electromec could have established that the other employees did not know that Saxer, Gilbert, Mooney and Pickelman had attempted to protect themselves by obtaining permission to leave early.

It is believed that Electromec could have established to a certainty as Porchein testified (opening brief page 18), and as the Trial Examiner apparently concluded, that the only purpose of the walkout was to retaliate against Porschein—an unprotected purpose.

Clearly, Electromec could have proved that the men who walked out knew that Saxer had already tendered his resignation.

Electromec would certainly have established that there was absolutely no connection between the September 21st meeting and the October 8th walkout.

Obviously, some of this evidence came in anyway, by cross-examination of the discharges. The point is, however, that when counsel is compelled to try the case blind, the record is incomplete, one side is deprived of a complete and fair trial, and the record is left in a condition which permits the Board to rationalize at will in order to reverse its Trial Examiner.

In the introductory notes to Rule 26 of the Federal Rules of Civil Procedure at 28 U.S.C.A. Rules 17 to 33 292, an extract from a law review article states the case on this issue as fully and fairly as it can be made:

“The rules, both by virtue of their express provisions and as a result of the liberal and enlightened manner in which they have been construed and applied by the courts, afford simple and efficacious means for a searching discovery, narrowing of the issues and obtaining evidence for use at the trial. They have proven a marked and noteworthy advance in the administration of justice. A number of states have adapted the federal practice in this respect for the use in the local courts. The discovery remedies embody a far-reaching step in the direction of achieving the principal goal of the new procedure, to which reference was made at the opening of this discussion, namely, the elimination of the ‘sporting theory’ of justice.” 1942, 41 Mich. L. Rev. 224.

It is submitted that the writer considered the former practice at least sporting in that both sides went into trial blind. It would be something of an understatement to suggest that this author might be astonished to learn that the Board not only considers it proper, but entirely appropriate, for one side to proceed to trial fully informed and the other side to go to trial without benefit of discovery.

CONCLUSION.

Respondent apparently does not take issue with the review of the labor relations at Electromec (opening brief pages 39-43) since no reference to these facts is found in Respondent's brief. As stated therein, this was an aspect of the case that should have been given some weight by the Board.

For the reasons set out in the opening brief and this reply brief, the Decision and Order of the National Labor Relations Board should be reversed and vacated, and its Cross-Petition for Enforcement denied.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. L. HOFVENDAHL

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELECTROMECH DESIGN AND DEVELOPMENT COMPANY, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for
Enforcement of an Order of The National
Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FILED

JUL 26 1968

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United States Court of Appeals

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ELECTROMECH DESIGN AND DEVELOPMENT COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for
Enforcement of an Order of The National
Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employees Robert Saxer, Davy Mooney, Wilfred Gilbert, and Charles Pickelman because of their participation in a protected work stoppage.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Electromec Design and Development Company, Inc., pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), to review an order of the National Labor Relations Board issued on December 8, 1967 (R. 145-154, 19-33).¹ The Board's decision and order are reported at 168 NLRB No. 107. The Board has cross-petitioned for enforcement of its order. This Court has jurisdiction over the proceeding, the unfair labor practices having taken place in Santa Clara, California, where petitioner (the "Company") is engaged in the servicing of electrical equipment. No issue as to the Board's jurisdiction is presented.

I. The Board's Findings of Fact

The Board found that the Company violated Section 8(a)(1) of the Act by discharging Robert Saxer, Davy Mooney, Wilfred Gilbert, and Charles Pickelman because of their participation in a protected work stoppage. The facts on which the Board's findings rest are summarized below.

In 1964, the Company added a metal shop to its operations in which, using tools and equipment provided by IBM, it constructed test equipment

¹ References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order, and other papers reproduced as Volume I, pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the rules of this Court are designated "Tr." References preceding a semi-colon are to the Board's findings; those following are to supporting evidence.

solely for that firm. The metal shop was divided by a partition into a sheet metal shop and a machine shop (R. 20; Tr. 85-87, 139). On various dates in 1965, the Company hired, at the behest of IBM, a number of tool and die makers to work in the machine shop. Among those hired were employees Saxer, Mooney, Gilbert, and Pickelman (R. 20; Tr. 87, 9-10, 36, 50, 65).

In February 1966,² a union representation election was held at the Company, and the employees voted to reject the Union³ (Tr. 21; R. 72, 88-89, 147). Thereafter, during March, Pickelman, Mooney, Gilbert, and two other tool and die makers approached Company President Joseph Padgett and requested that the employees be given a holiday on Good Friday. Padgett granted the request (R. 21; Tr. 37-38, 72, 91).

In mid-July, tool and die maker Saxer, who earned \$4.20 an hour, asked Carl Porschien, the manager of the metal shop, for a raise. Porschien agreed to check with his superiors, and returned later to tell Saxer that he would be given a five cent increase. A short time afterward, Saxer inquired if "there [was] any chance of getting a little more than this?" Porschien replied that there was no chance at that time, but that he would see what came up in the next four to six weeks. At the end of that period, Saxer again asked Porschien for an increase, claiming that the rate he was receiving was insufficient for a tool and die maker. Porschien disputed this and refused to grant Saxer an increase. Saxer then encouraged other employees to follow his example and ask the Company for raises (R. 21; Tr. 13-15).

² All dates are in 1966.

³ The record does not indicate the scope of the unit in which the election was held, but it is clear that such unit embraced at least the tool and die makers (R. 21; Tr. 89).

Shortly after Labor Day, Saxer again approached Porschien and inquired if an employee (Ford), who had not worked the day after Labor Day because of illness, would be paid for the holiday. Porschien responded by asking Saxer, "What are you, some sort of a committeeman or something for the group?" Saxer answered that he was only "trying to find out what happened," that "what happens to one man in the shop can happen to another man," and that he was therefore interested in knowing what the Company policy was (R. 21; Tr. 15-16).

In mid-September, the machine shop employees met and discussed working conditions at the Company in an effort to "tr[y] to figure out what points [they] would like to submit to management as things [they] wanted for benefits." They agreed to present the following demands to the Company: (1) a two week paid vacation after one year of employment; (2) an improved hospitalization plan; (3) sick leave; (4) a modification of the rule requiring employees to work the day before and the day after a holiday to be eligible for holiday pay; and (5) overtime pay for all Saturday work (R. 21-22; Tr. 16, 18).

Saxer then went to Porschien and submitted the employees' five demands to him. Porschien read the demands, but told Saxer, "I can't do anything about it." Saxer requested that Porschien "set something up with management or somebody [the employees could] talk to." Although Porschien acceded to this suggestion, there was some delay in arranging the meeting, and, therefore, "every other day or so" different employees in the machine shop would approach Porschien and question him as to when the meeting would be held (R. 22; Tr. 16-17, 52). A meeting for the tool and die makers was finally scheduled to be held on September 21, at 4:15 p.m., after working hours. A second meeting was arranged the next day for the remaining employees in the machine shop (R. 22; Tr. 17, 52, 148-149).

At the September 21 meeting, Saxer, Mooney, Pickelman, Gilbert and three other tool and die makers met with President Padgett, Vice-President Fred Vasta, and the leadman in the machine shop, Forrest Starr (R. 22; Tr. 18). When the meeting opened, Saxer, in response to a question by Padgett, acknowledged that he would be the spokesman for the employees. Saxer then presented the five points which the employees had agreed upon (R. 22; Tr. 93, 18). Padgett listened to the employees' proposals, promised an improved hospitalization plan, but otherwise rejected their demands. Padgett refused to change the Company's vacation policy of two weeks vacation after three years (as opposed to the employees' demand for two weeks after one year); explained that the Company was still too small to be able to afford sick leave; and contended that there could be no overtime for Saturday work because IBM's work-week began that day, and it was necessary for the Company to conform its work-week to that of IBM. Regarding the demand for modification of the rule requiring an employee to work both the day before and the day after a holiday to be entitled to holiday pay, Padgett asserted that this rule was necessary to prevent employees from leaving at noon on the day before a holiday or returning at noon the day after. Padgett agreed, however, that an exception might be made if the employee's absence was caused by illness and he proved this by bringing in a doctor's certificate (R. 22; Tr. 93-95, 26, 29, 47-48, 58, 73-74).

On Saturday, October 8, at 8 a.m., Saxer went to Porschien and told him that he "would like to talk to [him] about a raise." Porschien replied: "I just talked to you about a raise two or three weeks ago. Your rate is sufficient for a toolmaker, and we are going to keep this rate the way it is for a while." Saxer then told Porschien that if this was the situation, he was tendering his resignation as of October 14 (the end of

the work-week). Porschien answered, “All right, fine, Bob” (R. 23; Tr. 19-20, 25-26).

About 9 a.m., Porschien granted Saxer permission to leave early (R. 23; Tr. 159-155). Thereafter, Mooney, Gilbert, and Pickelman approached leadman Starr (Porschien was out of the metal shop at the time) and asked to be allowed to take the afternoon off. Although only Gilbert had an excuse for leaving before the end of the day – to see that his wife was following her doctor’s prescribed treatment for her high blood pressure – Starr gave all three employees permission to leave early (R. 23-24; Tr. 54, 67, 40, 189-186). The Company’s policy was that Saturday work was more or less optional, and that an employee could take the day off unless the Company was “in a position where a job had to be gotten out” (R. 24; Tr. 62-63).

Later, after going back to work, Saxer informed the other employees of his decision to resign. The employees then decided that this would be a good time to “wake up” management and that they would all leave early (R. 23; Tr. 20-21, 67, 40, 53-54).

At 11:22 a.m., all the employees in the machine shop, about ten men, plus Will Mooney of the sheet metal shop (a brother of toolmaker Davy Mooney) lined up at the time clock intending to punch out two minutes later at 11:24 a.m. Starr, noticing the employees “all ganged up at the clock”, asked the group “What’s going on here?” One or more of the employees replied that they were going home. Starr then left, found Porschien in the engineering department, and returned with him to the metal shop. Porschien asked the employees what was going on, and was advised by an employee that the men were going home. Porschien then told Saxer that he was under the impression that Saxer had wanted to leave at noon, and questioned Saxer as to why he was leaving at 11:24

a.m. rather than at lunchtime. At that point Mooney spoke up and explained that it would be easier to compute the pay for five hours work. At 11:24 a.m. the employees punched out and left (R. 24; Tr. 187, 156, 61).

After the walkout, Porschien informed an IBM manager, Cliff Walsh, as to what had happened, and Walsh undertook to notify officials of Electromec (R. 29; Tr. 157). Walsh reached Vice President Vasta later that evening, and the following morning, Sunday, Vasta informed President Padgett as to what had taken place. Padgett told Vasta to go to the plant with the manager of the personnel department, Kochenberg, and the assistant manager, Bunker, to telephone each employee who had walked off the job, and to ascertain why these employees had left. At the office Vasta and the two personnel men divided the list of names of those employees who had participated in the walkout and proceeded to call them (R. 29-25; Tr. 206-208, 98).

Vasta spoke to Saxer, Gilbert, and a third employee named Bates. When Vasta asked Saxer why he had left on Saturday, Saxer replied that he "felt like taking the afternoon off." Although Vasta pointed out that all the employees had walked off the job together, Saxer did not elaborate upon his excuse for leaving and said only that he "didn't know about the other men [, that t]hey [would] have to speak for themselves." Saxer declined to go to the Company office and speak to Vasta about the matter (R. 25; Tr. 208-209, 23).

Gilbert informed Vasta during their telephone conversation that he had left because "he was not happy with a 15-cent differential between his rate and the top rate in the shop."⁴ Vasta asked Gilbert to "come down

⁴ Tool and die maker Pickelman received the top rate, \$4.40 per hour (R. 20; Tr. 36).

to the office and talk to [him] about it personally,” but Gilbert refused, saying “No, I don’t want to do that. I will see you tomorrow as a group” (R. 25; Tr. 209, 67-68).

Bates, the last employee reached by Vasta by telephone, told Vasta he had walked out on Saturday because of the “mess in the shop.” Bates also advised Vasta that “he was unhappy with the whole situation and he didn’t know exactly what he was going to do.” Vasta then requested that Bates come down to the office, and Bates did. At the office, Bates remarked that ever since his failure to attend the September 21, meeting between the tool and die makers and management, “the rest of the boys in the shop [had given him] nothing but a hard time,” and refused to talk to him or have lunch with him. Bates explained that the reason he had left early was that he not only had to work with his fellow employees but “to live with them” (R. 25; Tr. 210).

Assistant Personnel Manager Bunker telephoned and spoke with two other employees who had participated in the walkout. Employee Jim McKenna reported that he had taken the rest of the day off because he had had an appointment, and Will Mooney explained that he had left because “he was tired of working overtime.” Bunker relayed what he had learned to Vasta (R. 25; Tr. 135, 137).

That same Sunday evening, after the phone calls were completed, Vasta met with President Padgett. Vasta suggested that all of the employees who participated in the walkout should be fired, but Padgett reminded him that there was “work to get out” and that it would be necessary to be more selective (R. 25; Tr. 212). When he arrived at the plant the next morning, Vasta told Porschien to remove the time cards of toolmakers Saxer, Davy Mooney, Gilbert, and Pickelman, and also the card of sheet metal worker Will Mooney. However, when Porschien

mentioned that he felt that Will Mooney “was just caught up into a situation whereby he . . . had to live with everybody” but that he was “primarily happy” with the Company, Vasta agreed not to pull Will Mooney’s card (R. 25-26; Tr. 211-213). Porschien then proceeded to remove the cards of the four remaining employees, and a few minutes later told Vasta all that he knew about the walkout (R. 26; Tr. 174-176).

Davy Mooney, who had been injured in a boating accident during the weekend, called leadman Starr to say that he would not be in, and Starr advised him to call back later because the tool and die men were having a meeting with management (R. 26; Tr. 54). The other three employees whose cards had been pulled — Saxer, Gilbert, and Pickelman — arrived for work shortly after 6 a.m. and were told by Porschien to wait. At 6:24 a.m., starting time, Starr told the employees not to prepare for work. About an hour later, Porschien ushered the three men upstairs to the conference room, where they joined Padgett, Vasta, and Bunker. Padgett looked through a file of papers that were in front of him,⁵ and then called upon Porschien to speak (R. 26; Tr. 21-22, 41-42, 43-44, 68, 101-102). Porschien informed the employees that their services as tool and die makers were no longer needed. When Saxer asked if this meant that they were discharged, Padgett answered “in a sense” and then, in response to a second question, assured the three employees that they would not be “blackballed” (R. 27; Tr. 79, 102, 22).

After Davy Mooney had learned from Starr that a meeting of the tool and die makers was being held, he drove to the plant. Upon arriving at

⁵ The Trial Examiner found that “it is possible that the papers which Padgett was examining were management accounts of what had been said and done by the four men and that in retrospect, he remembered these and confused them with such statements of the men as were made at the meeting.”

the parking lot Mooney encountered Pickelman, who advised him that “there wasn’t even any use to getting out, that [they] had all been fired.” Mooney then approached Porschien and asked him if it were true that he was fired. Porschien said that it was, and requested that Mooney follow him to the personnel office. At the office, Mooney questioned Porschien as to “exactly why he had been fired.” Porschien responded: “Well, Dave, we can’t have everyone going home at noon every time somebody quits.” Porschien also told Mooney that the services of the tool and die makers were no longer needed (R. 27; Tr. 54-55).

II. The Board’s Conclusions and Order

On the basis of the foregoing evidence, the Board found, in agreement with the Trial Examiner, that the Company discharged Saxer, Mooney, Gilbert, and Pickelman because they had engaged in a concerted work stoppage. The Board further found – reversing the Trial Examiner on this point – that this concerted activity, because it concerned terms and conditions of employment, was protected under Section 7 of the Act. The Board therefore concluded that the discharges violated Section 8(a) (1) of the Act (R. 145-151).

The Board’s order requires the Company to cease and desist from the unfair labor practices found. Affirmatively, the Company is required to offer reinstatement to Saxer, Mooney, Gilbert, and Pickelman, to make them whole for any loss of earnings suffered as a result of the unfair labor practices, and to post an appropriate notice (R. 152-154).

ARGUMENT

- I. Substantial Evidence on the Record as a Whole Supports the Board's Finding that the Company Violated Section 8(a)(1) of the Act by Discharging Saxer, Mooney, Gilbert and Pickelman because of their Participation in a Protected Walkout

Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection." As this Court noted in *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1, 3, Section 7 "specifically distinguishes between the purposes of collective bargaining and the purpose of other mutual aid or protection," and protects "concerted activities, even though not collective bargaining, which have to do with terms and conditions of employment."

The Company concedes that the walkout of October 8, was concerted activity (Br. p. 30). There is also no doubt that the four employees discharged — Saxer, Mooney, Gilbert, and Pickelman — were fired because of their participation in this concerted activity. The credited testimony of the Company's witnesses shows that on the Sunday evening after the walkout, after Vasta had spoken with several employees who had taken part in the walkout, he then conferred with President Padgett and suggested that all of the employees who had walked off the job should be fired. Padgett, as the Trial Examiner noted, "was inclined to be more selective," and pointed out to Vasta that the shop could not function if all of the employees were terminated. Vasta proceeded to select those employees to be discharged, and the next morning Saxer, Mooney, Pickelman, and Gilbert were dismissed.

The Company argues that the employees, who were highly paid tool and die makers, were discharged because they were overqualified for the work they were required to do and could be replaced by less skilled employees. The Company concedes, however, that absent the walkout it was content to wait and replace the toolmakers through normal attrition (Br. p. 24); indeed, three toolmakers who worked on the night shift and who did not participate in the walkout were not discharged (Tr. 110-111). As Vice President Vasta testified, the four toolmakers “were specifically fired because they had walked off the job without giving notice.” And President Padgett, when asked what led to the firing of the toolmakers replied, “walking off the job” (Tr. 110). It is thus evident that it was the walkout, rather than the fact that the toolmakers were “overqualified,” which provided the reason for the discharges.⁶

⁶ Thus, the fact that Saxer was to voluntarily terminate his employment with the Company shortly after he was discharged on October 10, has no bearing on the reason for his discharge. Prior to the walkout, the Company was obviously content to allow him to resign at the end of the week. It was only after Saxer had participated in the walkout that the Company decided to discharge him immediately.

The Company’s further argument (Br. pp. 22-23), that the discharges did not engage in “concerted activity” because they received permission to leave early, is completely without merit. In the first place employer permission is irrelevant in determining whether or not the employees engaged in concerted activities. The fact that some employees may have participated in concerted activity with the blessing of their employer does not, of course, render such activity any less concerted. To reason otherwise, would lead to the absurd result that an employer could deprive his employees of the right to engage in protected activities for their mutual aid and protection simply by sanctioning such activities.

In any event, the Company’s contention is factually incorrect. The four toolmakers did not seek, and were not given, permission to engage in a concerted work stoppage. As shown in the text (*supra*, p. 6), Saturday work was more or less optional and the Company did not care if some employees did not work that day as long as production at the shop did not suffer. The Company, therefore, did not object when the four toolmakers asked – as individuals – for permission to leave early. On the other hand, the Company did object strongly to the fact that these employees joined the entire machine shop in walking off as a group; and, while the four toolmakers may have had permission to leave early, they did not have permission to interrupt production by participating in a unified protest against management.

We come then to the question of whether the concerted activity for which the toolmakers were discharged was for the purpose of "mutual aid or protection," and therefore protected under Section 7 of the Act as activity concerning terms and conditions of employment. We submit that substantial evidence supports the Board's finding that the walkout was "a manifestation of the general dissatisfaction among machine shop personnel as to the failure of management to accede to their demands" (R. 149).

As the Board noted, the walkout was supported by all the machine shop personnel, a group which, during the three months preceding the walkout had demanded, both individually and concertedly, improvements in their terms and conditions of employment. Thus, these employees first insisted that they be given Good Friday as a paid holiday, and the Company acceded to this demand. Subsequently, in mid-July, Saxer asked manager Porschien for a raise, and was given a five cent increase. Further attempts by Saxer to secure an additional increase were unavailing and he then advised other employees to request increases from management. At least one employee, Davy Mooney, did ask for a raise (Tr. 51). On September 21, the tool and die makers met with President Padgett and other management representatives (the rest of the employees in the machine shop attended a similar meeting on the following day), and presented their demands for increased vacations, improved hospitalization, sick leave, modification of the rule requiring an employee to work the days before and after a holiday to be eligible for holiday pay, and overtime for all Saturday work. Saxer served as the spokesman for the employees. After listening to these proposals, Padgett promised some improvement in hospitalization benefits, but otherwise merely explained to the employees why the Company was unable to grant their requests.

These demands were still pending and unsatisfied when less than three weeks later – on October 8 – the employees walked out. Although the record did not disclose any new demands after September 21, the Board’s conclusion (R. 150) that the prior demands “were not so remote in point of time as to warrant their exclusion from our consideration in determining the cause for the walkout”, is plainly warranted, for “the language of Section 7 is broad enough to protect concerted activities whether they take place before, after or at the same time . . . [the] demand[s] [are] made.” *N.L.R.B. v. Washington Aluminum Co.*, 370 U. S. 9, 14.

Furthermore, as the Company recognizes (Br. p. 18) the walkout was obviously triggered by the decision of Saxer, the employees’ spokesman, (Co. Br. p. 34; *supra*, p. 5) to quit when he was again denied a wage increase. After Porschien told him “we are going to keep this rate the way it is for a while,” Saxer informed the other employees in the machine shop of his decision to resign. Later that morning the other employees in the machine shop decided that this would be a good time to “wake up” management, and that they would leave after five hours work at 11:24 a.m.

Based on this evidence the Board could properly find that the walkout was a response to management’s failure to grant the employees’ demands for additional benefits. While entirely plausible in itself, this conclusion is further buttressed by the weakness of any contrary explanation for the walkout. The idea that the employees were “mad” at Porschien and that the walkout was designed to embarrass him, a suggestion first raised by Porschien’s testimony (Tr. 17) and mentioned by the Trial Examiner (R. 32), simply cannot withstand scrutiny. The record indicates that Porschien, a Company official on an intermediate level (department manager for the machine and sheet metal shops), had no final control over wages or working conditions at the machine shop (Tr. 139, 148).

Porschien did not even attend the September 21 meeting between the tool and die makers and management (Tr. 149), and there was no reason why the dissatisfaction of the employees should have been directed specifically at him. The unlikelihood of such a possibility is borne out by the fact that when the Company later questioned the employees about the walkout not a single employee even hinted that he was angry with Porschien or that such anger was the reason for the walkout. The decision of the employees to “wake up” management could only have reference to their decision to bring home to the Company the seriousness of their demands.

The Company’s contention that when it discharged these employees, it had no knowledge that they had engaged in a protected walkout is unavailing. *N.L.R.B. v. Burnup & Sims*, 379 U. S. 21, 23-24. As *Burnup & Sims* made clear, the right of employees to engage in protected activities is not conditioned upon the employer’s awareness that such activities are in fact sanctioned by the Act. Accordingly, since the employees were discharged for engaging in protected activities, the employer’s knowledge of such activities is irrelevant. In any event, assuming, *arguendo*, that such knowledge is indispensable to the finding of a violation in this case, the Board could properly find as it did that the Company “knew or had reasonable basis for inferring that the walkout was but a further step by machine shop personnel to improve their employment terms” (R. 150). Thus, Vice President Vasta and Assistant Personnel Manager Bunker obtained considerable information during their telephone conversation with employees which tied the walkout to terms and conditions of employment. Toolmaker Gilbert told Vasta that he had left because he was dissatisfied with his rate of pay, and that the employees would speak to him the next day “as a group.” Employee Bates explained to Vasta that he had walked out because the situation at the shop was a mess, and that he was

unhappy with the whole situation. Bates further explained that he had been ostracized by his fellow employees for failure to attend the September 21 meeting. Similarly, employee Will Mooney advised Bunker that he had joined the walkout because he was tired of working overtime.

Finally, although Vice President Vasta had originally selected Will Mooney as one of the employees to be discharged, this decision was reversed when Porschien told Vasta that he thought Will Mooney really liked his job and was just “caught up” in the walkout (R. 26; Tr. 211, 213). By retaining Will Mooney on this basis the Company expressly recognized that the walkout concerned terms and conditions of employment.

In light of this evidence, and considering the fact that the Company was well aware of the concerted activities of its employees, the Board could properly find that the Company realized that the walkout was linked to employee dissatisfaction with their terms of employment.⁷

The Company also argues that even if the walkout was for a protected object, it lost such protection because “the National Labor Relations Act does not protect activities during working hours which disturb the efficient operation of the employer’s business.” This argument is without substance. *N.L.R.B. v. Washington Aluminum Co.*, *supra*, 370 U. S. 9. The disturbance of the employer’s business in this case was simply an interruption in production which is the normal result of an ordinary strike. Such interruptions are clearly protected as part of the right to strike under Section 7

⁷ Although the Trial Examiner drew a contrary inference and found that the walkout was not for a protected object, his finding is entitled to no special weight here. The Board adopted the Trial Examiner’s credibility determinations and findings of fact; it disagreed with the Examiner only as to inferences to be drawn from established facts. This was, of course, the Board’s prerogative. *N.L.R.B. v. Stafford Trucking, Inc.*, 371 F.2d 244, 249 (C.A. 7). See also, *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474, 496.

and 13 of the Act. For example, in *Washington Aluminum, supra*, the employees walked out to protest their employer's failure to provide adequate heat. The Court held that since the walkout constituted protected activity, the employees could not be discharged, even though the stoppage disturbed the employer's business and was in defiance of a plant rule which forbade employees to leave their work without permission. In short, there is no reason to regard the walkout as unprotected, and by discharging four employees who had participated in such activity the Company violated Section 8(a)(1) of the Act.⁸

II. The Company was Granted a Fair Hearing

Section 102.30 of the Board's rules⁹ provides that "Witnesses shall be examined orally under oath, except that for good cause shown . . . testimony may be taken by deposition." After issuance of the Complaint in this case the Company made application to take the depositions of the four dischargees in this proceeding, claiming that such depositions were "necessary" to enable the Company to "properly prepare" its case. The application stated only that the Company had not "communicated with [the dischargees] in any respect" and had "no knowledge concerning the unfair labor practices alleged."

The matter was submitted to the Associate Chief Trial Examiner, who denied the Company's request, "as good cause for granting the application

⁸ The cases cited by the Company in support of its position are inapposite (Br. 31-36). Both *Cleaver-Brooks Mfg. Corp. v. N.L.R.B.*, 264 F.2d 637 (C.A. 7), cert. denied, 361 U. S. 817 and *American Art Clay Co. v. N.L.R.B.*, 328 F.2d 88 (C.A. 7) involve the problem of whether employee protests concerning the assignment or selection of foremen are protected activity, or whether such protests interfere with management's exclusive right to handle its supervisory personnel as it deems fit. There is no similar problem involved in the present case. We are also not concerned here with a series of "quickie" walkouts by employees to exert pressure on an employer to bargain as was the case in *N.L.R.B. v. Blades Mfg. Co.*, 344 F.2d 998 (C.A. 8).

⁹ Rules and Regulations and Statements of Procedure Series 8, as amended.

does not appear” (R. 15, 16). The Company contends that this refusal to allow it to obtain depositions for purposes of discovery hampered the presentation of its case, and denied it a fair hearing. We submit that this contention must be rejected.

Although Section 102.30 does permit the taking of depositions for “good cause shown”, it is well established that neither this provision, nor any other provision in the Board’s rules, allows for general pretrial discovery. *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (C.A. 9); *N.L.R.B. v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (C.A. 7), cert. denied, 368 U. S. 823; *N.L.R.B. v. Chambers Mfg. Corp.*, 278 F.2d 715, 716 (C.A. 5); *Raser Tanning Co. v. N.L.R.B.*, 276 F.2d 80, 81-83 (C.A. 6), cert. denied, 363 U. S. 830; *N.L.R.B. v. Plumbers and Steamfitters Union Local 100*, 291 F.2d 927 (C.A. 5), enforcing 128 NLRB 398. See also, *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (C.A. 9).¹⁰ Cf. *N.L.R.B. v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 277 (C.A. 5), cert. denied, 390 U. S. 955.

In any event, the Company’s claim that lack of discovery hampered presentation of its case is without substance. Board procedures were completely adequate to allow the Company to fully present its case. Moreover, as the record shows, it did so. Board Rule 102.15 provides, *inter alia*, that “The complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the name of respondent’s agents or other representatives by whom committed.” Here, approximately six weeks before the hearing opened, the Company was served with a complaint which specifically framed the

¹⁰ Rule 102.30 was first adopted in its present form on October 28, 1942. 7 Fed. Register 8679.

issues for trial. It alleged that the Company violated Section 8(a)(1) of the Act by discharging Saxer, Mooney, Gilbert, and Pickelman, on or about October 10, 1966, because of their participation in protected concerted activity (R. 6). There was, therefore, no basis for the Company's claim, in its application to take depositions, that it had "no knowledge concerning the unfair labor practices alleged." Furthermore, in preparing for trial the Company could have interviewed the employees about specific matters alleged in the complaint.¹¹ The record shows that at the time of the events in question, the Company did interview employees who had participated in the walkout, and, as we have shown, *supra*, pp. 15-16 the Company was fully aware of what had happened, and the reasons for the employees' action. Furthermore, at the hearing, the Company cross-examined the discharges and was permitted to inspect pre-trial statements given by the witnesses to Board agents. The evidence which it asserts (Br. pp. 14-15) would have been adduced by means of deposition, could as easily have been presented at the hearing. In sum, the Company "has made no showing of prejudice suffered by reason of the Board's denial of pre-trial discovery." *Storkline Corp. v. N.L.R.B.*, 330 F.2d 14, 15-16 (C.A. 5). Accord: *N.L.R.B. v. Central Oklahoma Milk Producer's Ass'n.*, 285 F.2d 495, 498 (C.A. 10); *Trojan Freight Lines, Inc. v. N.L.R.B.*, 356 F.2d 947, 948 (C.A. 6); *N.L.R.B. v. Gala-Mo Arts*, 232 F.2d 102, 106 (C.A. 8).

¹¹ See, e.g., *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 133 (C.A. 5) and cases cited therein.

CONCLUSION

For the reasons stated, we respectfully submit that a decree should be issued denying the petition to review and enforcing the Board's order in full.

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July 1968.

IN THE
United States Court of Appeals
For the Ninth Circuit

HOWARD R. KIENLE and DORA J. KIENLE, his wife,
Appellants,

v.

ALAN BOUD FLACK, an underwriter at Lloyds, London, on
behalf of himself and all other Underwriters at Lloyds,
London, Subscribing Certificate of Insurance No. 18201
issued by VOIGT, WALKER & CO., INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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IN THE
United States Court of Appeals
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HOWARD R. KIENLE and DORA J. KIENLE, his wife,
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v.

ALAN BOUD FLACK, an underwriter at Lloyds, London, on
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issued by VOIGT, WALKER & CO., INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

I.

JURISDICTION

Appellee accepts appellants' statement of jurisdiction and resume of the pleadings.

II.

COUNTERSTATEMENT OF THE CASE

In 1964, Pacific Farwest Mortgage & Escrow Co. (hereinafter called "Pacific Farwest"), served as escrow agent in a sale between appellants Kienle, as sellers (herein-

after called "Kienle"), and Northwestern Utilities, Inc., as purchaser (hereinafter called "Northwestern"), involving approximately eight acres of real property in Renton, Washington (Tr. 26). Kienle, as sellers, and Northwestern, as purchaser, executed a master real estate contract which provided, in part, that if Northwestern resold any of the property on contract, said contracts would be given to Kienle as additional payment toward the contract balance under the master contract (pre-trial order, admitted facts R. 56-7). The parties executed escrow instructions which required Pacific Farwest to hold the fulfillment deed until full payment had been made under the master real estate contract (Ex. A-2; R. 56).

In June, 1964, Northwestern tendered three real estate contracts (executed by Krause and Whitley and covering a resale of a portion of the property) to Kienle in full payment under the master contract; Northwestern demanded that Kienle approve these contracts and that Pacific Farwest, as escrow agent, release the fulfillment deed to Northwestern (Tr. 164). Thereafter, on July 20, 1964, Pacific Farwest received a letter from attorney Gouge, representing Kienle, notifying Pacific Farwest that under no condition was the fulfillment deed to be delivered to Northwestern without the written consent of the sellers (Ex. A-7; Finding No. 13; Tr. 163). Three days later, Kienle employed another attorney who, by letter dated July 23, 1964, also instructed Pacific Farwest that the fulfillment deed should not be delivered to Northwestern without written consent of the Kienles (Ex. A-8; Finding No. 14; Tr. 142, 146).

When Pacific Farwest received these conflicting demands, Mr. DeCrane Cooke, its president, consulted at-

torney Leslie Yates,¹ for advice (Tr. 166, 167). Yates recommended to Pacific Farwest that it file an interpleader action, as permitted under the escrow instructions, because of the conflicting demands (Ex. A-2; Tr. 149-150, 167).

Pacific Farwest, by Mr. DeCrane Cooke,² intentionally decided to disregard the instructions from the Kienles' attorneys, to disregard attorney Yates' advice to interplead, and to deliver the fulfillment deed to Northwestern (Tr. 167, 168, 175, 183). Cooke testified that he clearly understood there was a "distinct possibility" that Pacific Farwest would be sued in the event he released the fulfillment deed to Northwestern (Tr. 175).

Prior to delivery of the deed, and to provide protection and security in the event of litigation, Pacific Farwest obtained an indemnity agreement from Northwestern, and its individual principals, the text of which is reproduced as appendix B to this brief for the court's convenience (Ex. A-30; Tr. 170, 175, 201-203). As additional security, before it would release the deed, Pacific Farwest demanded and obtained two demand promissory notes from Northwestern, each in the amount of \$1,500, one payable in the event suit should be commenced as a result of the release of the fulfillment deed and the other being payable unconditionally (Ex. A-31; Tr. 175, 180, 203-204). Pacific Farwest further demanded and obtained a mortgage from Northwestern to secure the unconditional promissory note (Tr. 176, 180).

1. Yates was the attorney who had incorporated Pacific Farwest about March 1, 1964 (Tr. 159), was a director of the escrow company and acted as counsel for the corporation. (Finding 15, R. 253; Tr. 81, 160, 166).

2. All action by Pacific Farwest, in connection with the Kienle escrow transaction, was taken by Mr. DeCrane Cooke, its president and escrow officer.

After Pacific Farwest obtained the executed indemnity agreement, two promissory notes and mortgage to secure the notes, it released the fulfillment deed from escrow on or about August 20, 1964 (Tr. 180). At about the time the deed was delivered, Northwestern paid Pacific Farwest the \$1,500 pursuant to the unconditional demand note (Tr. 175). As a result of the transfer of title, and the fraud of Northwestern, the Kienles lost title to their property without receiving adequate consideration.³

On November 12, 1964, Kienle commenced an action in State court against Northwestern, its principal officers, and other defendants including Pacific Farwest, to quiet title, to rescind the transaction and for damages. The State court complaint (Ex. A-20; Tr. 70), alleged against Northwestern, in part, as follows:

“That the defendant, Northwestern Utilities, Inc., and the defendant, William A. Cannon and Melvin Freimuth, on or about April 8, 1964, by means of fraudulent schemes, trick, misrepresentation, and pre-conceived deceit, induced the plaintiffs to enter into an Earnest Money Receipt and Agreement providing for the latters’ sale of their real property hereinafter described, to the defendant, Northwestern Utilities, Inc., for the sum of \$42,500.00. That said Agreement provided that the sum of \$5,000.00 was to be paid down by the defendant, Northwestern Utilities, Inc., and . . . the defendants hereinabove referred to did

3. The foregoing summarizes the facts found by the trial court as Findings of Fact 5 through 20 (R. 251-254). None are challenged by appellants, except that Finding 20 should have stated Pacific Farwest knew and appreciated there was a *distinct possibility* (rather than likelihood) of being sued by the Kienles if the deed were released. It was on the basis of these facts, peculiar to this case, that the court below further found as a fact that the delivery of the deed did not constitute a negligent act, error or omission (Finding 20, R. 254), and concluded that the delivery of the deed was an intentional and wilful act not within the coverage provision of the appellee’s policy of insurance (Conclusion 6, R. 261).

not intend to pay the down payment recited in said Earnest Money Receipt and Agreement and, in fact, never did make such payment.”

The complaint (Ex. A-20) alleged against Pacific Farwest, that:

“In fact, prior to and subsequent to the transaction involving plaintiff’s land, the defendant, Pacific Farwest Mortgage and Escrow Co. has been acting in collusion with the defendant, Northwestern Utilities, Inc., . . . and released the deed to Northwestern contrary to instructions.”

At all times material, Pacific Farwest was insured under the Escrow Agent’s Errors & Omissions policy here in question. In December, 1964, Pacific Farwest provided appellee with notice of the original Kienle complaint and tendered the defense of the action to appellee. Pacific Farwest’s notice advised appellee’s agent that details of the claim could be obtained from either DeCrane Cooke or Leslie Yates (Ex. 7; Tr. 21; Finding 23; R. 255). Yates forwarded the complaint and his answer prepared on behalf of Pacific Farwest to appellee’s representative (Finding 23; R. 255). Appellee employed the firm of Lane, Powell, Moss & Miller to investigate the claim and by letter dated February 15, 1965 (Ex. A-22; Tr. 60), Mr. Gordon Moss, one of appellee’s attorneys, advised Pacific Farwest that for the reasons stated in that letter, it was underwriters’ conclusion that the claim (original complaint against Pacific Farwest charging fraud and deceit) was not insured under the Errors & Omissions policy. Appellee’s attorneys closed their file and billed underwriters on or about March 15, 1965 (Tr. 39).

Meanwhile, without notice to appellee, on February 3, 1965, Kienle filed an amended complaint in the State

court action, adding new defendants and eliminating the allegation of collusion on the part of Pacific Farwest. Pacific Farwest did not advise or give notice to appellee of the amended complaint, did not forward the amended complaint to appellee, and did not tender defense of the amended complaint to appellee (Finding No. 27; R. 256 not challenged by appellants). By letter dated May 20, 1965, Mr. McCormick, one of appellants' counsel herein, wrote to appellee's attorney, Mr. Moss, advising him that the allegation against Pacific Farwest of collusion with Northwestern had been withdrawn and that an amended complaint had been filed (Ex. 5; Tr. 21). On May 24, 1965, Mr. Moss wrote a letter, a copy of which is reproduced as Appendix C to this brief, to Mr. Yates, Pacific Farwest's attorney, enclosing a copy of Mr. McCormick's letter and requesting that he be furnished (a) a copy of all relevant pleadings subsequent to the original complaint and answer, including particularly the amended complaint referred to in Mr. McCormick's letter, and (b) copies of the basic escrow documents, including the earnest money receipt and agreement, the real estate contract, and the escrow instructions (Ex. A-26; Tr. 46-47). No answer or other response was made by attorney Yates to this request and the requested pleadings, documents and information were not furnished (Tr. 54, 61, 65, 66).

The failure by Yates to respond to the request or furnish the pleadings and documents was no mere oversight. His determination not to respond was purposeful, based on his conclusion that it would be "futile" to comply with the insurer's requests because he "knew" underwriters would still deny coverage of the amended complaint and refuse to defend (Tr. 85, 94, 95).

Mr. Yates testified in part, regarding his failure to respond to Mr. Moss' request, as follows:

"I am sure if they had given me a glimmer that they were going to come in and help in some way or participate in some way or recognize some sense of liability, that I could have been a lot more cooperative than I was there." (Tr. 94).

Based on the testimony of Yates, the trial court found as a fact that the determination of Yates not to respond to Mr. Moss' letter and furnish the pleadings and documents requested, was an intentional decision on the part of Mr. Yates (Finding 30; R. 257).

On November 3, 1965, Mr. Yates initiated a telephone conversation with Mr. Moss, counsel for appellee, to advise that the State court action had been completed and the court in an oral opinion had held Pacific Farwest liable to the Kienles (Tr. 72). Counsel for appellee again requested and Yates agreed to furnish the basic escrow documents plus the indemnity agreement. This was insurer's counsel's first notice of the existence of an indemnity agreement (Tr. 72). Yates agreed to furnish, at appellee's expense, a transcribed copy of the trial court's oral opinion, and further agreed to consult with appellee's counsel when Yates was served with proposed Findings of Fact and Conclusions of Law (Tr. 73). Mr. Moss advised Yates that underwriters might want to finance an appeal if, after review by appellee's counsel of the documents and evidence, it was counsel's recommendation that an appeal was indicated (Tr. 73).

A month later, on December 1, 1965, counsel for appellee wrote to Yates, renewing his request for the documents (Ex. A-27; Tr. 97). Yates did not furnish the

documents or comply with the requests made by appellee's counsel in the telephone conversation of November 3, 1965, and did not respond to the December 1, 1965 letter (Finding 32; R. 258).

On March 1, 1966, judgment was entered against Pacific Farwest in the State court action in the amount of \$49,247.50. The findings of fact entered in the State court action were prepared by present counsel for appellants, who chose the language of the findings, which in part found Pacific Farwest "in error" and that its acts amounted to "negligence in performance of its contract of escrow," although neither the original nor amended complaint had alleged that Pacific Farwest was negligent⁴ (Ex. 4; Tr. 20). At the time these findings were prepared by appellants' counsel, they had already decided that appellants were going to be "coming after Underwriters at Lloyds." (Tr. 72).

On May 18, 1966, after notice of appeal was filed by Mr. Yates, attorney for Pacific Farwest, appellee's counsel wrote a letter to Yates, soliciting advice concerning the status of the appeal, suggesting that underwriters might want their counsel to assist Yates in prosecuting an appeal and requesting the information previously requested so that he might report to underwriters and obtain instructions (Ex. A-28; Tr. 97). No response was made by Yates or Pacific Farwest to this letter (Finding 33; R. 258-9).

Appellants then commenced the instant action seeking a declaratory judgment that appellee, as insurer of Pacific

4. In his oral opinion, the State Court Judge did not state that Pacific Farwest had been negligent; rather that Judge found Pacific Farwest had breached its contract of escrow in delivering the deed in violation of instructions. (Ex. A-29, p. 6; Tr. 209).

Farwest, was obligated to pay appellants the amount of the State court judgment against Pacific Farwest. Appellee's policy insures against liability in respect to claims made against the assured "by reason of any negligent act, error or omission" committed by Pacific Farwest in its professional capacity as escrow agent (Ex. 1). The policy excludes claims "brought about or contributed to by the dishonesty of the assured or any of their employees," and contain the following express condition precedent:

"5. The Assured shall as a condition precedent to their right to be indemnified under this Certificate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may reasonably request and as may be in the Assured's power. . . ."

From the evidence submitted at trial, the District court concluded that appellee was not liable to appellants herein.

III.

SUMMARY OF ARGUMENT

The District court correctly held that appellee was not liable to appellants on the following alternative grounds, each of which is sufficient to support the District court's judgment:

1. The judgment of liability entered against Pacific Farwest in the State court action was not binding on appellee-insurer. Notice to appellee and tender of defense of the original complaint was irrelevant because it alleged a claim of fraud against Pacific Farwest which was expressly excluded under appellee's policy of insurance. In addition, upon the filing of an amended complaint, the

original complaint became an abandoned pleading, did not support a claim by Kienle against Pacific Farwest and cannot be the basis of a claim against appellee. Appellee was not bound by the State court judgment based on the amended complaint because appellee was not given notice or furnished with the amended complaint, nor requested to defend the amended complaint. Appellants made no effort, and did not prove against appellee, an original case of liability on the part of Pacific Farwest to appellants. Accordingly, the District court had no alternative but to find that appellants failed to establish by a preponderance of the evidence, the liability of Pacific Farwest to the Kienles.

2. Pacific Farwest, as assured under appellee's policy, breached Condition No. 5 by intentionally failing to furnish the amended complaint when requested to do so, and by failing to furnish the documents and other information reasonably requested by appellee's counsel. The determination of the assured's counsel and director, Yates, that it would be futile to do so arrogated to himself a decision that appellee, not the assured, had the right to make under the policy. These acts constituted breaches of an express condition precedent to coverage under appellee's policy and, since appellants, as a judgment creditor, stand in the shoes of the assured, said breaches preclude appellants' recovery herein.

3. Even assuming the State court judgment of liability against Pacific Farwest is binding on appellee, it is not conclusive on the issue of policy coverage, and the finding of negligence is not binding because it was not essential to the judgment of liability. The only fact essential to the State court judgment against Pacific Farwest was that it

delivered the deed in violation of the escrow instructions. Because the judgment is not *res judicata* of policy coverage, and because the State court finding of negligence cannot be binding on appellee, the District Court could properly determine the question of policy coverage *ab initio*, without assist from the State court findings. The evidence demonstrates that the conduct of Pacific Farwest in releasing the deed, in conscious violation of the Kienles' instructions and with knowledge of the risk of suit, was a wilful decision and deliberate business gamble, and did not constitute a "negligent act, error or omission" under the escrow policy.

IV.

ARGUMENT

A. The Trial Court Correctly Held That the Judgment of Liability Entered Against Pacific Farwest in the State Court Action Was Not Binding on Appellee-Insurer; Appellants' Failure to Prove a Case of Original Liability Against Pacific Farwest Precludes Appellants' Recovery

The threshold issue on this appeal is whether or not the State court judgment of *liability* against Pacific Farwest was binding on appellee-insurer. This issue involves basic principles of *res judicata* and indemnity law, rather than insurance law. This issue is critical because if appellee was not bound by the judgment of liability against its insured, then it was incumbent upon appellants to establish that liability. However, appellants made no effort, in the court below, to prove that Pacific Farwest was legally liable to appellants.⁵ The District court found that,

5. To prove liability, appellants would have had to establish that the three real estate contracts tendered to the seller (appellants) by the buyer (Northwestern) did not comply with the requirements of the master contract. However, the master contract, the three Krause and Whitley real estate contracts and the purchasers escrow instructions were not even made exhibits in the proceedings below. In addition, appellants did not offer proof of damages.

in this action, appellants did not prove that Pacific Farwest was legally liable to appellants (Finding 41; R. 259). Appellants assign error to this finding, only because "it completely presupposes that the findings and judgment of the State court action are not binding on this insurer." (App. Br. p. 65.) Thus, it is clear that appellants rely entirely on the proposition that appellee-insurer was bound by the judgment of liability entered in the State court action.

If appellants are to hold appellee bound by the State court judgment of liability, they must meet the requirements of *East v. Fields*, 42 Wn.2d 924, 259 P.2d 639 (1953):

"The rule is that *when an insurer has notice of an action against an insured, and is tendered an opportunity to defend*, it is bound by the judgment therein upon the question of the insured's liability. 1. Freeman, judgments (5th ed.) 978, §447, 30 Am. Jur. 969, §237, and Restatement, Judgment 511, §107, 259 P.2d at 639," (Emphasis added.)

The Washington court, in *East v. Fields*, cited §107 of the Restatement of Judgments which provides that if a third person (appellants) has obtained a valid judgment in a separate action against the indemnitee (Pacific Farwest), then as between indemnitor (appellee-insurer) and indemnitee (Pacific Farwest),

"... both are bound as to the existence and extent of the liability of the indemnitee, *if the indemnitee gave to the indemnitor reasonable notice of the action and requested him to defend it or to participate in the the defense.*" Id. at 511. (Emphasis added.)

Similarly, in *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953), the court said:

"If the indemnitor was not a party to the original

action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not given reasonable notice of the action and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action." *Id.* at 795.

Therefore, it is necessary to review the undisputed facts of this case to determine whether appellee was given both adequate notice of the State court proceedings against Pacific Farwest and tendered the defense of that action. In this connection it is essential to distinguish between the original complaint and the amended complaint, in the state court proceedings, because the judgment of liability was predicated upon the amended complaint alone.

1. Notice and Tender of Defense of the Original Complaint Is Not Determinative of the Issue of Res Judicata.

The original State court complaint alleged that Northwestern was liable for "its fraudulent schemes, trick, misrepresentation, and preconceived deceit" and that Pacific Farwest had been acting in collusion with Northwestern. The policy of insurance expressly excludes claims "brought about or contributed to by the dishonesty of the Assured or any of their employees." (Ex. 1)

It is well established in Washington that the obligation of an insurer to defend is to be determined by the allegations of the complaint. *Town of Tieton v. Gen. Ins. Co.*, 61 Wn.2d 716, 380 P.2d 127 (1963); *Lawrence v. Northwest Cas. Co.*, 50 Wn.2d 282, 311 P.2d 670 (1967). In the *Lawrence* case, a liability insurance policy provided, in part, that assault and battery was to be deemed

an accident unless committed by or at the direction of the insured. The first complaint filed against the insured alleged assault and battery committed by the insured, and the insurer declined to defend. Thereafter, the complaint was amended to allege that the injury had been inflicted carelessly and negligently as well as wilfully and intentionally. The *Lawrence* court said:

“The defendant’s obligations to the plaintiff must be found in the pertinent provisions of the contract, which are clear and unambiguous. It undertook to ‘defend any suit against the insured, alleging such injury.’ . . . It is clear that the investigation of the occurrence was a matter which rested within the discretion of the defendant, and *its obligation to the plaintiff arose only when suit was brought, alleging an accident arising out of negligence, which was within the terms of the policy.* The trial court correctly held that the defendant’s liability did not arise until the serving of the second complaint, which had been amended to include an allegation of negligence. In cases where similar policy provisions have been construed, we have held that the insurer’s liability to defend is to be determined by the allegations of the complaint filed against the insured. *Globe Nav. Co. v. Maryland Cas. Co.*, 39 Wash. 299, 81 Pac. 826; *Isaacson Iron Works v. Ocean Accident & Guarantee Corp.*, 191 Wash. 221, 70 P.2d 1026. See, also, annotation in 50 A.L.R.2d 458.” 311 P.2d at 672-3. (Emphasis added.)

The *Lawrence* decision clearly demonstrates that the Washington Supreme Court has held, and this court must follow the rule, that the insurer’s liability to defend is to be determined by the allegations of the complaint. Appellants’ suggestion that cases from other jurisdictions may afford an excellent precedent, is therefore not appropriate. The allegations against Pacific Farwest in Kienle’s first complaint in State court alleged fraud, which

under appellee's policy was excluded by terms which were clear and unambiguous. The District court's second conclusion of law (R. 260) provides the original complaint did not allege a claim against Pacific Farwest within the policy coverage and that appellee was justified in declining coverage of the claim alleged in the original complaint. The allegations of Kienle's original complaint dictate this conclusion. *Appellants have not specified this conclusion as error*, and should not be heard in this court to contend that it was error.

Therefore, it must be concluded that, appellee was justified in declining coverage under the original complaint. Pacific Farwest's notice and tender of defense of the original complaint cannot be determinative of the issue of *res judicata*, and is irrelevant to the issue of whether appellee is bound by the State court judgment of liability against the assured.

The filing of an amended complaint gave rise to an entirely new claim, as between appellants and Pacific Farwest. *Lawrence v. Northwest Cas. Co.*, 50 Wn.2d 282, 311 P.2d 670 (1957); *Gen. Ins. Corp. v. Harris*, 327 S.W.2d 651 (Tex. Ct. Civ. App. 1959). The *Harris* court said:

"In this case we shall not attempt an analysis of Hill's original petition. Upon the filing of the first amended petition the original petition became an abandoned pleading, could no longer furnish the basis of Hill's claim against Harris, and could no longer be considered in determining the nature of Hill's claim. Under the circumstances of the case it has become immaterial whether the original petition alleged facts bringing Hill's claim within the coverage of Harris' liability policy, as appellee contends in a counter-point, or whether it did not, as appellant contends in its first point on appeal. In the light of

subsequent events the original petition is not to be considered in determining appellant's liability." 327 S.W.2d at 655.

Therefore, in order to establish that appellee was bound by the State court action, appellants were required to establish that appellee received proper notice of, and a request to defend, the amended complaint. *State Mutual Etc. Ins. Co. v. Watkins*, 181 Miss. 859, 180 So. 78 (1938).

2. Pacific Farwest Failed to Give Appellee Notice of the Amended Complaint or to Tender Appellee an Opportunity to Defend the Amended Complaint.

The District court's Finding of Fact No. 27, which is not specified as error on this appeal, is as follows:

"The assured, Pacific Farwest Mortgage and Escrow Company, or its attorneys or representatives, did not advise or give notice to the defendant or his representatives of the amended complaint, did not forward the amended complaint to defendant or his representatives, and did not tender defense of the amended complaint to defendant or otherwise request underwriters to defend the amended complaint."

Appellants do not challenge this finding and the evidence in support of it is uncontradicted. It must accordingly be accepted by this court.

To satisfy the requirements of notice and tender of an opportunity to defend, appellants rely solely on a letter of May 20, 1965, from appellants' counsel McCormick to Mr. Moss, Exhibit 5 herein. This letter states, in part, that:

"Since February 15, 1965, our investigation has led us to believe that your client's insured was not acting

in collusion with the defendant, Northwestern Utilities, Inc., and all parties have been served and there is on file an Amended Summons and Complaint reflecting this."

The issue presented is whether or not this letter (Ex. 5) satisfies the requirements of *East v. Fields, supra*, which requires that the person entitled to indemnity (Pacific Farwest) give reasonable notice of the action and request that the indemnitor (appellee) defend the action. There is no evidence that Pacific Farwest gave any notice to appellee; and no person ever requested appellee to defend the amended complaint. Exhibit 5 can hardly constitute such notice and tender of defense of the amended complaint so as to bind underwriters to a judgment subsequently entered.

Upon receipt of Exhibit 5, Mr. Moss wrote his letter of May 24, 1965, to Mr. Yates (Ex. A-26; Tr. 63).⁶ In his letter, Mr. Moss requested all relevant pleadings subsequent to the original complaint and answer, including particularly the amended complaint. Appellants do not challenge Finding of Fact No. 27, that no answer or response was made by Yates to this request and that the pleadings, documents and information were not furnished.

It is noted that McCormick's letter of May 20, 1965 (Ex. 5), was not sent to Underwriters at Lloyd's, the insurer, or to Voigt, Walker & Co., Inc., its authorized Seattle representative. It was sent to Mr. Moss, who had closed his file and billed Underwriters some two months

6. Mr. Yates was the assured's counsel who had forwarded the original complaint to Voigt, Walker & Co., Inc. (Ex. A-21, Tr. 70); he had been originally designated by Pacific Farwest as one from whom details of the claim could be obtained (Ex. 7; Tr. 21; Finding 23; R. 255), and, of course, he would have a copy of the amended complaint.

previously, after declining coverage of the original complaint. Under these uncontroverted facts, it must be concluded that appellee did not receive proper notice and tender of defense of the amended complaint, and is not bound by the State court judgment based on that amended complaint. *East v. Fields, supra*; Restatement of Judgments §107. In Comment (e), Restatement of Judgments, §107, these requirements are amplified to show that it is not enough that the indemnitor have notice of the action against the indemnitee; he must in addition be requested to defend it. Thus the text states:

“ . . . the person entitled to indemnity must give adequate notice of the action to the indemnitor and request that he should defend it or participate in the defense. . . . The notification must contain full information about the proceeding, and normally at least the indemnitee, if requested to do so, is under a duty to give to the indemnitor what information he has concerning the nature of the claim and the evidence.

“In order to bind the indemnitor in a subsequent action against him, the indemnitee is not obliged necessarily to surrender the entire control of the defense; he must, however, request the indemnitor to participate. . . .

“The indemnitor is not bound by the judgment merely because he knew of the action or was a witness in it.” *Id.* at 515-6.

The intentional determination of the assured through its attorney, Mr. Yates, not to forward the amended complaint, as requested, also is material in connection with the District court's finding that the assured breached a condition precedent to policy liability, as will be discussed hereafter in this brief. However, the failure to forward the amended complaint, and the failure of the

assured or anyone else to tender defense of it to underwriters, or even to contend that the policy covered the claim now made, must preclude the subsequent judgment on that amended complaint from having any binding effect upon appellee. This conclusion must follow because underwriters never had an opportunity to determine whether to "take over and conduct in the name of the Assured the defense or settlement" of the amended complaint, which right is expressly reserved to underwriters in the policy of insurance.

3. *Appellants Failure to Prove an Original Case of Liability Against Pacific Farwest Precludes Appellants' Recovery Herein.*

Because Pacific Farwest did not give appellee notice of the amended complaint or tender appellee an opportunity to defend, it was incumbent upon appellants to prove an original case of liability on the part of Pacific Farwest. *Seattle v. Saulez*, 47 Wash. 365, 92 Pac. 140 (1907); *Merriman v. Maryland Cas. Co.*, 147 Wash. 579, 266 Pac. 682 (1928). In *Merriman*, Maryland Casualty Co. issued a liability policy to one Bowman, who operated a farm. Merriman, injured by Bowman's vicious horse, obtained a default judgment against Bowman and commenced an action against the insurance company. A condition of the policy required that the assured furnish the company with a copy of any summons or process and an opportunity to defend any claim. It was undisputed that after Merriman was injured, Maryland Casualty Co. was informed of the injury and some correspondence relating to settlement occurred. However, there was no allegation that the insurance company was informed of the pendency of the action or at any time had an oppor-

tunity to defend it. The insurance company sought the right to defend upon the merits as against the plaintiff's claim that he was personally injured through the negligence of Bowman. The trial court held the injured person could maintain an action on the merits without the right on the part of the company to defend on the merits. The Washington Supreme Court reversed, saying:

"... no case has been cited, and in our investigation we have discovered none, which holds that the failure of the assured to inform the company that an action has been begun, as required by the policy, enables the injured person to maintain an action on the policy after obtaining a judgment against the assured without giving to the insurance company the right to defend upon the merits as to the question of liability and the amount thereof. *The appellant had the right, at some time at least, to an opportunity to defend upon the merits and this is something that as yet it has never had.*" 266 Pac. at 683. (Emphasis added.)

Thus, it is clear that not only was it incumbent upon appellants to prove an original case of liability against Pacific Farwest, but appellee had the right to defend upon the merits, the claim of liability against Pacific Farwest.

However, in the District court, appellants did not attempt to prove an original case of liability against Pacific Farwest. Rather, appellants elected to stand on their contention of *res judicata*, and did not prove Pacific Farwest's release of the fulfillment deed from escrow was wrongful or violated their legal rights, or that Pacific Farwest was legally liable to appellants because of the release and delivery of the deed.

Pursuant to the Federal Rules of Civil Procedure, which permit the pleading of alternative positions, appellee

contended at the District court trial that (a) Pacific Farwest was legally within its rights under the escrow instructions to deliver the deed to the purchaser; and (b) that the intentional release of the deed, under all the circumstances, was an intentional business risk not covered by the escrow insurance policy here in issue. Appellee's contention that Pacific Farwest was legally within its rights under the escrow contract to deliver the deed to the purchaser, Northwestern Utilities, Inc., is supported by testimony of attorney Yates, who believed the escrow instructions had been satisfied. However, it should be noted that any determination of liability would necessarily involve a consideration of the master real estate contract between Kienle and Northwestern, the three real estate contracts between Northwestern and its purchasers (Krause and Whitley), the purchaser's escrow instructions and other documents, none of which were offered in evidence herein.

Finally, the record is void of any evidence to support appellants' contention that Pacific Farwest was not legally justified in releasing the fulfillment deed to Northwestern, despite the unilateral attempt of the sellers to prevent performance of the escrow contract by Pacific Farwest. Accordingly, the District court judge had no alternative but to find that plaintiffs (appellants herein) had failed to establish, by a preponderance of the evidence, a case of original liability against Pacific Farwest (Finding 41; R. 259).

B. Pacific Farwest's Breach of Condition Precedent No. 5 of the Policy Precludes Appellant's Recovery

1. *The assured, Pacific Farwest, breached Condition No. 5 in failing to furnish the amended complaint to appellee's counsel after being requested to do so, and in failing to furnish documents and other information requested by appellee's counsel.*

Condition No. 5 of the policy states:

"The assured shall as a condition precedent to their right to be indemnified under this certificate give to Underwriters immediate notice in writing of any claim upon them and further upon request, shall give to Underwriters such information as Underwriters may reasonably require and as may be in the assured's power."

The only notice to appellee that an amended complaint had been filed was McCormick's letter to Mr. Moss on May 20, 1965 (Ex. 5). Mr. Moss immediately directed a letter to Leslie Yates, attorney for Pacific Farwest, requesting all relevant pleadings subsequent to the original complaint and answer, including particularly the amended complaint. Attorney Yates neither responded to this request nor furnished the requested documents. Yates testified that he did not respond or furnish documents because it would, in his opinion, have been "futile" to comply with the insurer's requests because "he knew" underwriters would continue to deny coverage under the policy (Tr. 85, 94, 95). The failure of attorney Yates to furnish the requested documents, and in particular the amended complaint, constituted a material breach of Condition No. 5 of the policy. As a consequence, appellee did not receive proper notice of the claim or sufficient information to evaluate the claim and determine whether

or not to exercise this right to assume the defense of the case.

It was a fundamental right of appellee, under the subject insurance contract, to determine whether or not the amended complaint should be defended by underwriters. The policy specifically provided that "underwriters, if they so desire, shall be entitled at their own expense to take over and conduct in the name of the assured the defense or settlement of any claim." It was not within the authority of appellee's attorney, Mr. Moss, and certainly not Pacific Farwest or its counsel, Mr. Yates, to make underwriters' decision. Obviously, the purpose of Mr. Moss' letter of May 24, 1965 to Mr. Yates was to obtain the amended complaint and forward it to London so that underwriters might determine whether or not to defend it. When Mr. Yates determined that "it wouldn't have accomplished anything as far as my client was concerned," to have sent the amended complaint, he prevented Mr. Flack, and other underwriters, from obtaining proper and adequate notice of the amended complaint and further prevented underwriters from exercising their policy rights to defend the suit.

Although the instant policy does not expressly contain a "suit forwarding" clause, appellee submits that, when appellee's counsel Moss requested that Yates forward the amended complaint (and other pleadings), the legal consequence was the same as if Condition 5 had expressly provided: "If suit is brought against the insured, he shall immediately forward to the company, every demand, notice, summons or other process received by him or his representative." In *Lee v. Travelers Ins. Co.*, 184 A.2d 636 (Munic. Ct. App. D.C. 1962), the court said:

“The two requirements (notice of accident and forwarding of suit papers) have essentially the same purpose, i.e., notice to the insurer. Notice of the accident enables the insurer to make prompt investigation and prepare to defend any action that may be brought. Forwarding the suit papers gives the insurer notice that an action has been brought and enables it to properly defend.” 184 A.2d at 639.

Thus, it seems clear that the forwarding of suit papers is a part of the notice to underwriters. Attorney Yates, counsel for Pacific Farwest, obviously recognized this when he forwarded the original complaint to appellee (Ex. A-21; Tr. 70). If there were any doubt about the assured's obligation to forward the amended complaint, it was removed by the specific request of appellee's counsel to Mr. Yates for the amended complaint. Clearly the amended complaint was information “reasonably required” by underwriters under Condition No. 5. How else could they determine whether to exercise their policy right to defend the suit? In addition, the assured's continuing refusal to furnish the basic escrow documents was also in direct violation of the second portion of Condition No. 5 which requires the assured to provide “information as underwriters may reasonably require and as may be in the assured's power.”

2. *Pacific Farwest's breach of Condition No. 5 of appellee's insurance policy precludes appellants' recovery herein*

A review of judicial precedent completely supports the District's court Conclusion of Law No. 5 that the assured's intentional failure to furnish the amended complaint to appellee's counsel, after being requested to do so, constituted a material breach of the policy condition

and precluded recovery by appellants.

The case of *Sussman v. Am. Sur. Co.*, 345 F.2d 679 (5th Cir. 1965), supports the District court's conclusion, and is discussed at length in appellant's brief in an attempt to distinguish it. In *Sussman*, the original complaint was tendered to the insurer who declined coverage, and the defense of the action, because the complaint alleged facts excluded under the policy. An amended complaint was then filed adding a claim which was covered by the policy, but the insurer was not given notice or forwarded the suit papers. The *Sussman* insurance policy required the insured to immediately forward to the insurer every demand, notice, summons or other process received by him or his representative. Because this policy provision was breached, the *Sussman* court held for the insurer, stating that:

"Since American Surety was neither notified of the amended complaint nor given any opportunity to participate in the defense on the merits, it cannot be required to pay *Sussman* the amount of the State court judgment she obtained against Mario." *Id.* at 680-1.

Appellants attempt to distinguish the *Sussman* case because the insurer in *Sussman* did not receive notice of the amended complaint. In contrast, an attorney (Mr. Moss) who had previously acted for the insurer was given notice that an amended complaint had been filed against Pacific Farwest. However, this distinction is not significant in light of the two separate and distinct requirements of (1) adequate and proper notice of the amended complaint *and* (2) an opportunity to defend. In contrast, in the present case, neither the amended complaint was furnished to appellee, nor was there a request by anyone

that appellee undertake the defense of the amended complaint.

The case of *Gen. Ins. Corp. v. Harris*, 327 S.W.2d 651 (Tex. Civ. App. 1959), is also closely in point. In *Harris*, Hill sued Harris, the insured, alleging wilful and wanton destruction of property. Harris tendered the defense to General Insurance Co. which declined on the alternate grounds that the policy did not cover property damages at all (but only bodily injury) and did not cover bodily injury if caused by wilful and wanton acts. Thereafter, a first amended complaint was filed which was tendered to the insurer and again rejected. Three more amended complaints were filed and the third one finally alleged bodily injuries. Harris, the insured, did not forward the last amended complaint to his insurance company. Harris settled the claim for \$3,500 and sued on the policy. Condition 9 of the Harris policy required the insured to forward to the company every demand; notice, summons or other process. The *Harris* court, in giving force and effect to the condition of the policy, said:

“It is undisputed that Harris did not send the Company copies of Hill’s amended petitions in which he added new allegations asserting a claim for bodily injury.

“Condition No. 9 is a very important provision in the insurance contract between the Company and Harris. The policy had not been cancelled. If Harris expected to hold the Company liable on the policy he should have complied with Condition No. 9 when Hill filed new allegations bringing suit within the coverage of the policy, thus giving the Company an opportunity to take over defense after amended petitions were filed bringing the case within policy coverage. Harris’ failure to do so violated the terms of his insurance contract, and was fatal to his re-

covery from the Company in this suit." 327 S.W.2d at 657.

Similarly, in *Merriman v. Maryland Cas. Co.*, 147 Wash. 579, 266 Pac. 682 (1928), the Washington court said:

"In the present case the respondent is basing his action upon a liability policy, which he claims was made for his benefit. The conditions of that policy, by its express terms, were that the respondent should have a right to defend any action that was brought against the assured and that the latter would furnish to the company the summons and other process that might be served upon him. It is at once apparent that the respondent cannot pick out of this insurance contract those provisions which are especially beneficial to him and disregard all other provisions." 266 Pac. 683.

We agree with appellants' contention that the general rule is that an insurer is estopped from relying on breaches of the cooperation clause occurring after the insurer has denied coverage under the policy. However, this rule has no application here because when the Amended Complaint was served and filed, as between assured and underwriters it was an entirely new claim. *Sussman v. American Surety Co.*, 345 F.2d 679 (5 Cir., 1965). This is so because the original Complaint alleged a claim of fraud excluded by the policy and there could be no estoppel or waiver arising from defendant's rightful declination of coverage of that claim.

No case cited by appellants holds that by rightfully declining defense of an excluded claim, an insurer waives breaches of policy conditions thereafter occurring when the situation has changed and an Amended Complaint (for purposes of this argument, assumed to be within policy coverage) is made against the assured.

Appellants rely primarily on two cases (discussed at pages 40-45 in their brief) which do not support their contentions. In *Lee v. Travelers Ins. Co.*, 184 A.2d 636 (Munic. Ct. App. D.C. 1962), the insurer made an investigation of the claim and carried on settlement negotiations. When suit was commenced, counsel for the insured party offered to send the insurer a copy of the suit papers, but this offer was refused. On the following day counsel for the injured party gave the insurer ten days notice that he intended to enter a default against the insured. The following language from the *Lee* decision, in holding the insurer had notice of the filing of the suit, and was afforded full opportunity to defend, clearly distinguishes that case from the present case:

“In the present case, while it is undisputed that the insured failed to forward the suit papers to the insurer, it is also undisputed that the insurer received notice of the accident, made an investigation and carried on settlement negotiations which were broken off when an agreement could not be reached. The reasonable inference is that the insurer was well aware of the facts and legal issues involved and of the probability that suit would be filed.

“When suit was filed and the insured failed to forward the suit papers, default was not taken without notice to the insurer. Appellant’s counsel notified the insurer of the pending action and offered to furnish the insurer with copies of the suit papers; when this offer was refused appellant’s counsel notified the insurer of the intention to take a default but at the same time offered to agree to extension of time the insurer required for filing of the suit and was afforded full opportunity to defend. It refused, taking the stand that it was not required to defend because of the failure of the insured to forward suit papers.” 184 A.2d at 638.

The case of *Northwestern Mut. Ins. Co. v. Independ-*

ence Mut. Ins. Co., 319 S.W.2d 898 (St. Louis Ct. App. Mo. 1959), (App. Br. p. 43), can also be distinguished. In this latter case, the attorney for the third party subrogated insurance carrier actually forwarded the suit papers to the insurer, and fully complied with the condition precedent in the policy. In contrast, *no one* forwarded the amended complaint to appellee and no judicial precedent requires an insurer to go further than to request the insured to forward an amended complaint. In addition, appellee notes that the *Northwestern Mutual* court cites a decision from this court, which is in complete accord with appellee's position. In *Metropolitan Cas. Ins. Co. v. Colhurst*, 36 F.2d 559 (9th Cir. 1930), the insured (Harris) had an automobile liability policy requiring the insured to give written notice of accidents and to forward every summons or process to the insurance company. Colhurst, who had been injured in an accident with Harris, commenced an action in Solano County, California, which summons was immediately forwarded by Harris to his insurer. The insurer employed an attorney to defend on behalf of Harris, and he prepared and filed an answer for the insured. Thereafter, plaintiff's attorney wrote to the attorney for Harris, advising him that he had dismissed the Solano County suit and had commenced another action in Napa County, California. Harris, who was personally served in the Napa County suit did not provide a copy of the new complaint to the insurer, and permitted a default judgment to be taken against him. Suit was then commenced by Colhurst against Metropolitan Casualty Insurance Co. on the Napa County judgment. Judgment against the insurance company was reversed on appeal

because of the breach of the policy condition. This court said:

“We do not think the letter referred to, from one attorney to the other, is a material circumstance. The important consideration was that appellant should be advised of the service of process so that it could appear in response thereto, in the assured’s name, and make defense. This information the letter did not purport to give, and, until the defendant was served with process, appellant was powerless to take appropriate steps for its protection.

“In that view, admittedly, because of his default in not sooner forwarding the summons and complaint, Harris, in case he had satisfied the judgment against him, could not have recovered upon the policy, and the question is whether or not, for like reasons, appellee is subject to the same liability.” 36 F.2d at 561.

The *Colhurst* court, after reviewing cases from other jurisdictions, including the *Merriman* decision in Washington, concluded that the injured party was subject to the same disabilities to which the insured would be subject should he pay the judgment and seek indemnity.

The trial court also found that under Condition No. 5, appellee was entitled to be furnished with the documents and information appellee’s counsel requested that Mr. Yates furnish to him (Finding 30; R. 257). The provision of Condition No. 5 that the assured shall give to underwriters such information as they may reasonably require is this policy’s equivalent of a “cooperation clause.” In *Hilliard v. United Pac. Cas. Ins. Co.*, 195 Wash. 478, 81 P.2d 513 (1938), the court stated with respect to the enforceability of a cooperation clause:

“‘cooperate’ . . . does mean that the assured must give the insurer full, fair and frank disclosure of all

information reasonably requested by the insurer to enable it to determine if there is a genuine defense.” 81 P.2d at 516.

Requirements in liability policies for the cooperation of the insured universally have been held valid. Appleman on Insurance, §§4771, 4774. The insured cannot arbitrarily or unreasonably decline to assist in making a fair investigation or defense of a claim. *Royal Indem. Co. v. Morris*, 37 F.2d 90 (9th Cir., 1930).

There is no doubt that the assured's counsel (and director) Yates intentionally determined not to furnish the documents and information requested. These escrow documents were the basic contracts out of which Pacific Farwest's liability, if any, would arise. They were surely material and were hence reasonably requested by underwriters.

3. *Condition No. 5 of the policy is a condition precedent to recovery.*

As they unsuccessfully did in the court below, appellants continued to urge that the furnishing of information, including presumably the amended complaint, is not a condition precedent to the insurer's liability. This position is based upon appellants' remarkable construction of the language of Condition No. 5 and the use of the singular term "condition precedent." Appellants reached this strained result despite the fact that the requirement of giving notice and the further requirement of furnishing information both follow the introductory language of this 4-line, one-sentence paragraph that the obligations imposed are a "condition precedent to their right to be indemnified." This attempt to import an ambiguity into

Condition No. 5 of the policy should not be tolerated. In *Hamilton Tr. Service v. Auto Ins. Co.*, 39 Wn.2d 688, 237 P.2d 781 (1951), the court said:

"We have not adopted the lines of reasoning found in the cases cited by respondent in order to determine the intent of the parties, or what they may or must have contemplated when making an insurance contract with reference to the extent of the risk coverage when it was clear that the words were used in their ordinary sense or meaning, nor when the language used was plain and unambiguous. . . . We have taken the position in such matters that a rule of construction should not be permitted to have the effect to make a plain agreement ambiguous and then construe it in favor of the insured. . . . We cannot avoid feeling as we read the cases cited by respondent that those courts have created ambiguities where none existed and have then used rules of construction to determine the intent of the parties and what they must have contemplated, thus enlarging the risk coverage of the insurance policies under consideration." 237 P.2d at 783-4.

Appellees therefore submit that the evidence fully supports the District court's finding that Pacific Farwest, by the acts of its attorney Yates, breached Condition No. 5. The breach of this condition precedent by Pacific Farwest, precludes appellant Kienles' recovery, because they stand in the shoes of the assured. In *Van Dyke v. White*, 55 Wn.2d 601, 349 P.2d 430 (1960), the court said:

"If a party has breached a contract condition precedent, neither he nor one standing in his shoes may maintain an action on it, and prejudice or the lack of it is immaterial. Only a waiver of such breach or estoppel to assert it by the defendant can remove this fatality." 349 P.2d at 433.

Because of the assured's breaches of policy conditions, appellee had no opportunity to investigate the merits of

Kienles' amended complaint to determine whether or not it was covered under the policy and whether or not underwriters would defend the amended complaint. We are not here concerned with whether, in spite of Pacific Farwest's default, underwriters could have protected themselves, but whether Pacific Farwest (and those who stand in its shoes) forfeited its right, by violating a material condition of the policy. For as admitted by appellants, the breach of an express condition precedent will release the insurer from the obligations imposed by the insurance contract, although no prejudice may have resulted (App. Br., p. 36). *Sears, Roebuck & Co. v. Hartford Etc.*, 50 Wn.2d 443, 313 P.2d 347 (1957). Appellants cannot pick out of the subject insurance policy those provisions which are especially beneficial to them and disregard the express language of Condition No. 5 of the policy. In the *Sears, Roebuck & Co.* case, *supra*, the Washington court said:

"Since an insurance policy is merely a written contract between an insurer and the insured, courts cannot rule out of the contract any language which the parties thereto have put into it; cannot revise the contract under the theory of construing it; and neither abstract justice nor any rule of construction can create a contract for the parties which they did not make for themselves." 313 P.2d at 350.

This court must enforce Condition No. 5 of the policy as written.

C. The Trial Court Correctly Found and Concluded That Pacific Farwest's Release and Delivery of the Fulfillment Did Not Constitute a Negligent Act, Error or Omission Within the Basic Coverage Provisions of the Policy

The question of whether the assured's act of delivering the deed constituted "a negligent act, error or omission

within the coverage of appellee's policy, is doubtless the most intellectually challenging issue in this case. However, it is an issue which this court need not decide unless the court first holds that appellee, insurer, is bound by the judgment of liability entered in the State court proceedings against the assured, and holds further that Pacific Farwest did not breach an express condition precedent of the policy. If appellants successfully hurdle these two obstacles, they must then establish that Pacific Farwest's intentional release of the deed, in violation of written demands from Kienle's attorney was conduct insured under appellee's policy covering claims arising out of a "negligent act, error or omission" committed by the assured. The District court concluded that the act of the assured in releasing the fulfillment deed from escrow, upon which the assured's liability to appellants was based in the State court action, was an intentional and wilful act and did not constitute a negligent act, error or omission within the meaning of the coverage provisions of the policy (Finding No. 20; Concl. of Law 6; R. 254, 261).

1. Even if the state court judgment of liability against Pacific Farwest is binding on underwriters, the finding of negligence is not binding because it was not essential to the judgment of liability.

The applicable Washington rule of law was established in *East v. Fields*, 42 Wn.2d 924, 259 P.2d 639 (1953). In the *Fields* case, plaintiffs brought an action to recover damages for injuries suffered in an automobile accident in Washington. Defendant Fields owned the car and had a policy of insurance which excluded coverage if the car was driven by another member of the armed forces without the insured's consent. Fields tendered the defense of

the action to his insurer, who denied coverage. Plaintiff recovered a judgment against Fields and defendant Finch, a soldier who was driving at the time of the accident. In a subsequent garnishment proceeding, in the same action, plaintiffs garnished Field's insurance company contending that a finding of fact in the main action, that Fields was in the car at the time of the accident, was *res judicata*, and therefore binding on the insurance company. The garnishee-defendant produced evidence that the defendant-owner was not in the car at the time of the accident, and accordingly the court dismissed the writ. Plaintiffs appealed to the Washington Supreme Court, presenting the issue of whether the insurance company could relitigate whether or not Fields was in the car at the time of the accident.

The Washington court set forth the following rules, controlling on this court:

"The rule is that when an insurer has notice of an action against an insured, and is tendered an opportunity to defend, it is bound by the judgment therein upon the question of the insured's liability. 1 Freeman, Judgments (5th ed.) 978, §447; 30 Am. Jur. 969, §237; and Restatement, Judgments 511, §107. *The judgment, however, is not conclusive as to the question of coverage of the policy in question (Restatement, Judgments 517, §107 (g)), for the reason that the causes of action for tort liability and for indemnity liability are separate and distinct.* 1 Freeman, Judgments (5th ed.) 991, §450. *Thus, the judgment fixing the tort liability of the defendants in the main action is not res judicata of the indemnity liability of the insurance company in the garnishment proceedings.*" 259 P.2d at 639. (Emphasis added.)

Thus, it is clear, under Washington law, that the judgment fixing the liability of Pacific Farwest in the State court

action (assuming for argument that appellee is bound) is not *res judicata* of the policy coverage question in the Federal court proceedings. Notwithstanding this, the *Fields* court indicated the doctrine of collateral estoppel might apply in a proper case. However, a review of this doctrine demonstrates it is inapplicable in the present case. The *Fields* court said:

“Notwithstanding this, the doctrine of collateral estoppel applies in a proper case. This doctrine is that the insurer is bound by any material *finding of fact* essential to the judgment of tort liability, which is also decisive of the question of the coverage of the policy of insurance. Restatement, Judgments 293, §68. . . .

“Restatement, Judgments 309, §68, states the rules as follows:

“The rules . . . [regarding collateral estoppel] are applicable only where the facts determined are essential to the judgment. Where . . . the court makes findings of fact but the judgment is not dependent upon these findings, they are not conclusive between the parties in a subsequent action based upon a different cause of action.

“2 Black on Judgments (2nd ed.) 928, §611, states the rule as follows:

“The rule has always been regarded as well settled, from the earliest authorities down to the present time, that the judgment, . . . is not conclusive of any matter which was incidentally cognizable in that action, or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment. “The estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon.”

“As to what facts are material, 2 Black on Judgments 938, §615, says:

“ ‘A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. . . . it is conclusive evidence of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further.’ ”
259 P.2d at 640.

In the *Fields* case, the Washington court concluded, based on the above-quoted rules, that the finding that Fields was in the car was material because liability was based on the doctrines of *respondent superior*, and agency, and that no other fact in the findings had even a remote bearing upon those doctrines. In contrast, in the State court action by Kienle, the only *facts* essential to the judgment against Pacific Farwest was that it delivered the deed in violation of the sellers’ instructions. The characterization of Pacific Farwest’s conduct as “negligence” rather than as simply a breach of the escrow contract was not “essential” to the judgment.⁷ Certainly, the judgment could have been rendered without a “finding” of negligence. Thus, the finding of negligence is not determinative of the policy coverage issue, and not binding on appellee.

7. How *non-essential* to the judgment of liability against Pacific Farwest was the formal “finding” of negligence is indicated by the following: no negligence, error or omission on the part of Pacific Farwest was alleged by Kienle in either the original or amended complaints which, rather, alleged a breach of contract. (Ex. 3; Ex. A-20); in the State court litigation appellant’s counsel argued to the trial judge that Pacific Farwest breached its contract (Ex. A-29; Tr. 209), and in his oral opinion, the State court judge so held (Ex. A-29 p. 6; Tr. 209). It is instructive to note that the language of Findings of Fact V in the state court action (Ex. 4; Tr. 20) was admittedly drafted by appellants’ present counsel (Finding 39, R. 259), and was most likely so drafted for the sole purpose of forming a predicate for collection of the judgment from Pacific Farwest’s errors and omissions insurer, the language of whose policy appellants and/or their counsel knew at the time the Findings were drafted. We do not contend impropriety on the part of appellants’ counsel in so doing; however, we do contend that this boot-strap effort to establish liability on the part of the insurer, who was not a party to the prior action, must be held ineffectual.

This court, in determining whether or not the conduct of Pacific Farwest in releasing the deed, under all the unique attendant circumstances, constituted a "negligent act, error or omission," may approach this issue *ab initio*, with no assist from the language of the findings entered in the prior state court action.

2. *The conduct of Pacific Farwest in releasing the deed, in conscious violation of the Kienles' instructions, was a wilful business decision, and did not constitute a negligent act, error or omission under the escrow policy.*

(a) *Conduct of Pacific Farwest.* The evidence supports the District court's conclusion of law that the act of the assured, Pacific Farwest, in releasing the fulfillment deed from escrow, was an intentional and wilful act and did not constitute a "negligent act, error or omission" within the meaning of the coverage provisions of appellee's policy of insurance. Pacific Farwest had been instructed in writing by two separate attorneys representing Kienle, not to release the deed from escrow. Pacific Farwest consulted its attorney, Mr. Yates, who recommended interpleader, an alternative expressly permitted under the escrow instructions, and characterized as "a fool proof alternative" by appellants' brief at page 22. Notwithstanding this advice, Mr. Cooke, president of Pacific Farwest, decided to deliver the deed, and obtained a written indemnity agreement from Northwestern, two promissory notes, each in amount of \$1,500 (one of which was paid) and a mortgage to protect Pacific Farwest in the event of litigation. Cooke knew, prior to the time the deed was released, that there was a "distinct possibility" that Pa-

cific Farwest would be sued if the deed was released.⁸

Thus, as the District court found, Pacific Farwest and its chief officer, Mr. Cooke, knew and fully appreciated that there was a likelihood of being sued if the deed was delivered, but Pacific Farwest nevertheless intentionally and wilfully delivered the deed from escrow (Finding 20; R. 254). The issue then presented is whether or not this conduct constituted a negligent act, error or omission under the policy.

(b) *Policy Coverage is limited to negligent conduct.* The policy covers "negligent act, error or omission." It covers liability caused by negligence alone. Under standard principles of construction and use of the English language, the adjective "negligent" modifies all three of the triad of nouns following it, so the phrase is to be read as if it said "negligent act, negligent error, or negligent omission." A *Grammar of the English Language in Three Volumes, Vol. III, Syntax*, by George O. Curme, pp. 68, 69. In his section entitled "Repetition of Limiting Adjective," on page 68, Dr. Curme states the following rule which is directly applicable to the policy phrase involved in this case:

"If the limiting adjective modifies two nouns, both representing the same person or thing, or parts of a

8. Cooke's motivation in his calculated decision to release the deed is not made entirely clear by the record. Was it because, quixotically, he believed that Northwestern had complied with its contract with appellants and was entitled to the deed and that under the escrow instructions he had a right to release the deed. (Tr. 193)? Or was it because Northwestern was his best customer, having given him a dozen escrows to handle in less than a year (Tr. 162)? Or was it simply because he considered the fifteen hundred dollars cash Northwestern paid him, plus a promissory note for another \$1,500 in the event Pacific Farwest was sued, plus a formal written indemnity agreement, a sufficient *quid pro quo* for his violation of the seller's instructions not to release the deed?

whole, it should be used only once; while, on the other hand, if the nouns represent different persons or things that it is desired to contrast or to mark as distinct and separate, the limiting adjective should be repeated before each noun. . . .”

The three nouns “act, error or omission” are all “parts of a whole” and belong together for they all refer to something the assured has done or not done which forms the basis of a claim against him which the policy insures. Hence, the limiting adjective “negligent” modifies all three of them.

(c) *The conduct of Pacific Farwest was not negligent.* A review of Washington decisions clearly indicates that Pacific Farwest’s act of delivery of the deed, under all the facts here in evidence, did not constitute negligence. In *Adkisson v. Seattle*, 42 Wn.2d 676, 258 P.2d 461 (1953), the court said:

“Wilful or wanton misconduct is not, properly speaking, within the meaning of the term ‘negligence’. *Negligence and wilfulness imply radically different mental states. Negligence conveys the idea of neglect or inadvertence, as distinguished from premeditation or formed intention. An act into which knowledge of danger and wilfulness enter is not negligence of any degree, but is wilful misconduct. As long as the element of inadvertence remains in conduct, it is not properly regarded as wilful.* Wanton misconduct is positive in nature, while mere negligence is materially negative. A person properly chargeable with wanton misconduct is not simply one who is more careless than one who is merely negligent. Wanton misconduct is such as puts the actor in the class with the wilful doer of wrong. 38 Am. Jur. 692 Negligence, §48”. 258 P.2d at 465. (Emphasis added.)

Similarly, in *Town of Tieton v. Gen. Ins. Co.*, 61 Wn.2d 716, 380 P.2d 127 (1963), suit was commenced on a

liability policy insuring the Town against legal liability for damages caused by accident. The Town constructed a sewage lagoon which contaminated an adjoining landowner's well and the landowner recovered judgment against the Town. The lagoon was constructed and operated in precisely the manner planned, expected, desired and intended, although the Town did not intend that it should contaminate the well. However, the evidence showed that the possibility of contamination was fully appreciated by the assured and all concerned, but that the Town decided to assume the risk of damage to the well because it was the only location possible to construct the lagoon. The Town had two choices: make a prior settlement with the landowner or proceed with the construction and wait to see if contamination occurred. The court said:

"The Town officials deliberately chose the latter course and proceeded with construction of the lagoon. This meant that they necessarily had to accept whatever hazard existed that the Town might damage the Pugsby property as a result of the construction. . . ." 380 P.2d at 130.

The trial court held that the damage was caused by accident within the meaning of the policy because the results of the Town's intentional conduct were unanticipated. The Supreme Court disagreed, and held no coverage under the policy in language which we submit is fully applicable to the case at bar:

"The evidence most favorable to respondent suggests no more than a finding that respondent took a calculated business risk that the Pugsby property could not be damaged. From a business standpoint, it may have been wise to have taken this calculated risk. . . . But when, under the facts of this case, the possi-

bility of contamination became a reality, it cannot be said that the result was 'unusual, unexpected, and unforeseen'". 380 P.2d at 130-1. (Emphasis added.)

Admittedly the policy in *Town of Tieton* insured against liability caused by accident and the instant policy does not, but the case indicates the Washington court would regard Pacific Farwest's intentional gamble and calculated business risk as constituting the antithesis of neglect or inadvertence which is required for conduct to constitute negligence. *Adkisson v. Seattle, supra*. Nor is it necessary, as appellents suggest, that the actor intend, in a subjective sense, that harm should result to the third party in order for his act to be removed from the category of negligence and become wilful conduct. It is only necessary that he intend the natural and probable consequences of his act. The case at bar is even stronger than the *Town of Tieton* case. Whereas, the Town did not intend to contaminate Pugsby's well and did not know as a certainty that it would be contaminated, Pacific Farwest fully intended and knew that delivery of the deed would complete the conveyance of Kienles' title with whatever damaging consequences to Kienle that would naturally flow from investing Northwestern with record title (Finding 20; R. 254).

The distinction between a negligent act and an intentional act, in the determination of an insurer's liability, was also recognized by this court in *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.*, 133 Fed. 636 (9th Cir. 1904). This was a suit on a marine cargo policy for damage caused as a result of the vessel's sailing through an ice field. The court stated the facts, and the conclusions to coverage to be drawn from such facts, as follows:

“It appears, however, from the testimony of the master himself, that he well knew of the existence of the ice and of the risk incurred in endeavoring to push through it, and that he well knew all of this in ample time to have avoided it. Can it be properly held that it was not his duty to have avoided the danger—that he did not commit a wrongful act when he deliberately, willfully, undertook to ‘fight’ his way, as he himself expressed it, through the ice, for the purpose of arriving quickly at Nome, and this secure for his principals a better price for the merchandise, and that they might the sooner realize the profits expected to accrue from the lighterage plant that he carried? We think this must be answered in the negative. Taking the captain’s testimony to be true, *it is not, in our opinion, a case of negligence at all whether simple or gross, but one of a deliberate and reckless assumption of a well-known danger, which the law made it the master’s duty to have avoided.* It was both a willful omission to perform his legal duty, and an intentional commission of a wrongful act, resulting in the loss in question, for which, both upon principle and authority, the insurer, in our opinion, is not liable.” 133 Fed. at 646-7 (Emphasis added.)

In further explanation of the distinction the court said:

“Negligence and willfulness are the opposites of each other. . . . Negligence is also to be carefully distinguished from fraud; the distinction arising in this case, as before, upon the element of inadvertence. Fraud is invariably intentional, either actually or constructively; negligence is never so * * * An intent to do a wrongful act or to omit the performance of a duty is necessarily willful. Such willfulness may fall short of fraud. . . . 133 Fed. at 647-8.

(d) *The conduct of Pacific Farwest was not an “error” or “omission” within policy coverage.* Pacific Farwest’s liability concededly arose out of its wrongful act in releasing the fulfillment deed from escrow. Clearly only “negligent” acts are insured, and if as we contend, this

act was not negligent within the policy meaning and hence not covered, it would seem anomalous to hold the same conduct covered by the policy because it constituted an "error." Such an interpretation would ignore the limited adjective "negligent" in the subject policy which modified "act, error or omission."

However, even assuming negligent modifies only the word "act," the conduct of Pacific Farwest did not constitute an "error" or "omission" so as to come within the policy coverage. In *Simon Warrender Prop. Ltd. v. Swain*, (1960) 2 Lloyd's List L.R. 111, suit was brought on an insurance broker's errors and omissions policy insuring against "neglect, omission or error." An employee of the insured brokerage company wilfully failed to effect a policy of insurance on a fishing vessel owned by one Williamson, who sued the company for his loss, and the company having paid, made claim against underwriters. The issue before the court was whether the wilful and deliberate nature of the employee's failure to effect the insurance was a good defense under the policy. The court held that the intent of the employee would not be imputed to the company under the facts of that case, but by necessary implication we believe the court also held that losses resulting from the deliberate acts of the assured, or officers whose acts are necessarily those of an insured corporation, are not within the coverage of such a policy. The *Swain* court stated:

"But as the plea also alleges that the failure to effect the policy was wilful and deliberate, it is essential to determine whether the words of indemnity embrace such a failure.

"It is clear that in their primary sense both the words 'error' and 'omission' denote conduct which

is not intentional or deliberate. . . . All these words show that 'the policy deals rather with leaving undone the things one ought to have done rather than with doing things which one ought not to have done'." *Id.* at 115.

The ground of distinction relied on by the court in the *Swain* case to invoke policy coverage is not present in the case at bar, because Pacific Farwest acted through its president, whose intentional decision, with appreciation of the hazards of litigation, is necessarily attributable to the assured.

The case of *Whitworth v. Hoskin*, (1939) 65 Lloyd's List L.R. 48, a decision of the Mayor's and City of London's Court, also supports appellee's position. One Frith, an accountant, was insured by Lloyd's under an indemnity policy insuring against claims "in respect of any act of neglect, default or error." One Kirby, who used Frith's office and facilities with his consent, defrauded plaintiff, who thereafter recovered judgment against Frith. Plaintiff then sued Frith's errors and omissions underwriters as assignee. The *Hoskin* court said:

"Then it is said that 'he held out Kirby as his representative and as a person entitled to receive money on behalf of the vendor or James Frith & Co.' The answer of Mr. Soskice to that is that 'that was not a 'neglect' or an 'error.' It is quite clear from Frith's evidence that it was what he intended to do and what he did do. There was no neglect about it at all and there was no error.' As to that, of course, that is the matter, in a way, that the judgment was suffered in respect of, but it does not, to my mind, come within the terms of this policy.

"On the cases cited to me, I think it is quite clear that that is not the sort of act which can be described as a 'neglect' or 'error,' that is, when a man is doing

exactly what he intends to do, even if he may be wrong in doing it." Id. at 50. (Emphasis added.)

Similarly, in *Haseldine v. Hoskin*, (1933) 45 Lloyd's List L.R. 59, a solicitor was sued for bringing a lawsuit under a contingent fee agreement and posting costs for his client, an illegal practice though the solicitor was not aware of the illegality. The solicitor settled the suit and sought indemnity from Lloyd's underwriters. The court held no coverage, first because the act on which the solicitor's liability was based was illegal, and second, because it was not within the policy coverage entirely apart from the illegality. Lord Justice Slessor stated:

"Lastly, I am unable to see that there was any loss sustained here by an 'neglect, omission or error.' The loss sustained here is the result of an action brought because this gentleman, Mr. Haseldine, financed and assisted in an action, thereby causing damages to Messrs. Sterms, damages which were originally stated as special damage to amount to the sum of £2811 and which he subsequently compromised for a considerably smaller sum. *I am unable to say that this loss was caused by an error. It was caused by Mr. Haseldine entering into an agreement; that agreement was not entered into in error; It was done deliberately by him for the purposes recited in the agreement. He may or may not have mistaken the legal effect of what he was doing, but it is wrong in my opinion to say that the loss was occasioned by error. The loss was occasioned by the agreement.*" Id. at 67.

Thus, it must be concluded that Pacific Farwest's delivery of the deed was not a "negligent act, error or omission" within the policy coverage. No reasonable construction of the policy requires appellee to underwrite the failure of the assured's intentional business gamble under the circumstances of this case.

3. *Appellant's authorities do not support their contention that the conduct of Pacific Farwest constituted a negligent act, error or omission under the escrow policy.*

Appellant's place primary reliance upon *Sutherland v. Fid. & Cas. Co.*, 103 Wash. 583, 175 Pac. 187 (1918). In *Sutherland*, a physician contracted with a patient to remove all of his gallstones and all cause of disease possible to be removed by a surgical operation. The physician failed to find the offending gallstone, which failure was the basis of his liability to the patient.⁹ The physician sued on his malpractice policy insuring him against "loss from liability imposed by law" on account of bodily injury suffered in consequence of "malpractice, error or mistake" in the practice of his profession. Although the physician recovered, the case is clearly not in point. Rather, the case involved a simple case of negligence rather than the kind of intentional conduct which appellants seek to bring within the policy coverage.

Similarly, in *Brown v. Underwriters at Lloyd's*, 53 Wn. 2d 142, 332 P.2d 228 (1958), a real estate broker was held liable because the court said he was careless in not making an investigation as to the truth of the owner's statement before passing it on to the buyer of property involved in a sale. There was no evidence that the broker knew the statement to be false.

Two California cases, also relied upon by appellants, are equally not in point. In *Russ-Field Corp. v. Underwriters at Lloyd's*, 164 Cal. App.2d 83, 330 P.2d 432

9. It affirmatively appears from the reported opinion in the suit by the patient against the physician, *Schuster v. Sutherland*, 92 Wash. 135, 158 Pac. 730 (1916), that the physician simply missed the gallstone.

(1958), a motion picture producer's policy covered claims for negligent act, error or omission and for breach of contract. The producer settled an action alleging breach of contract in making changes in a script, and then sued underwriters on the policy. The distinguishing features of that case are evident from the language of the court's opinion, immediately following appellant's quote at page 33 of their brief, as follows:

"The finding that the breach, if one occurred, was not 'wilful' is supported by substantial evidence. Mr. Tatelman testified in substance that he made arrangements for filming from the revised screenplay on the assumption that Mr. Genn would play his role in the revised version without objection. It is a legitimate inference that when Mr. Genn's objections were made known, it was too late to do anything but proceed to produce the film on the revised version." 330 P.2d at 440.

Similarly, in *Aitchison v. Founders Ins. Co.*, 166 Cal. App.2d 432, 333 P.2d 178 (1959), the insured's liability was based upon his certificate that the ore he sold to the government was of domestic origin, but he did so in good faith *without knowledge* that the ore had been smuggled into the country.

Appellants can find no authority to support their position that the policy insures the kind of intentional business risk undertaken by Pacific Farwest, and therefore rely upon shopworn contention that the policy should be liberally construed in favor of the insured. However, contrary to the implication of appellants, in construing insurance policies, the Supreme Court of Washington does not avidly seize upon every element of doubt so as to create an ambiguity and then construe it against the insurer so as to permit recovery by the insured. Rather, the court ad-

heres to the concept that the polar star of construction of an insurance contract is the intention of the parties. *Boeing Etc. Co. v. Fireman's Etc. Co.*, 44 Wn.2d 488, 268 P.2d 654 (1954); *Gen. Cas. Co. v. Azteca Films, Inc.*, 278 F.2d 161 (9th Cir. 1960). Coverage is clearly limited to claims made against the assured "by reason of any negligent act, error or omission." The absense of an express exclusion concerning intentional acts is not necessary in light of the plain and unambiguous scope of policy coverage. Notwithstanding this fact, and contrary to appellants' assertion, appellee does not urge, and this court need not hold, that every intentional act is beyond policy coverage. Undoubtedly there are circumstances where the act, though intentional, would nonetheless be classed as negligence. An example is *Bancroft v. Indem. Ins. Co.*, 203 F. Supp. 49 (W.D. La. 1962), cited by appellants on page 34 of their brief. There the insured accountant deliberately and intentionally issued an opinion to a client that a proposed stock transfer would be nontaxable. He was wrong and the court held his resulting liability to the client was covered by his professional liability policy covering "neglect, error or omission." But as the accountant's testimony clearly showed (203 F. Supp. 52), in his research he simply missed section 304 of the 1954 Internal Revenue Code. Thus, no sweeping generalization that the policy does not cover any intentional act of the assured is required in order to uphold the judgment of the court below.

Appellants ask, what does this policy cover if it does not cover a legal liability incurred as a result of an escrow transaction? It certainly covers more than liability from an upset ink bottle obliterating a signature. *Citizens Nat.*

Bank v. Davisson, 229 U.S. 212, 57 L.2d. 1153 (1913) furnishes an example. There a depositary returned money to the buyer on a real estate contract without checking the provisions of the contract, in reliance on an incomplete memorandum of the conditions written on an envelope containing the contract. The Supreme Court held this was a negligent omission; this would have been covered by an errors and omissions policy. Counsel for appellee have handled for Underwriters at Lloyds a number of claims against escrow agents which reasonably would come within the protection of the policy. These include a claim based on the escrow agent's failure to obtain an acknowledgment on an option for extension of a lease of real property, invalidating the extension under the statute of frauds; and a claim based on the escrow agent's negligent failure to record a second mortgage which caused damage to the mortgagee when he lost his priority. Appellee's policy is not illusory and the protection afforded not a sham. But compare these examples and those in the cases cited by appellants with the facts of the instant case: the escrow agent not only intentionally violated the instructions of the seller not to deliver the deed, but he sold his violation of instructions to the buyer for \$1,500. This conduct was a wilful act not within any reasonable construction of the protection which underwriters took to furnish by the policy.

This is not a case where the State legislature has required an automobile owner to maintain liability insurance for the protection of the public. The only relevant public policy to this case is the requirement that an escrow agent maintain a fidelity bond for fidelity coverage. There is no requirement that liability insurance be maintained, and

Pacific Farwest was not required to carry errors and omissions insurance. It must follow that appellants have no standing to complain, as against appellee, that the policy which Pacific Farwest did in fact carry was vitiated by the acts of Pacific Farwest.

If underwriters are held to have insured Pacific Farwest in these circumstances, they in effect become partners in the escrow business with Pacific Farwest, and their insurance policy becomes a surety bond. No rule of liberal construction of insurance policies in favor of insureds and against underwriters, so as to "effectuate desirable social purposes" either compels or justifies this result.

D. The Findings of Fact Entered by the District Court Specified as Error, are Fully Supported by the Evidence.

Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. The Federal courts have frequently stressed the importance of the trial judge's advantage to see and hear the witnesses as they testify. *Orvis v. Higgins*, 180 F.2d 537 (2nd Cir. 1950), cert. denied, 340 U.S. 810, 95 L.ed. 595 (1950). The weight to be given to the specific finding, will, of course, depend upon the character of the evidence.

1. Finding of Fact 20

Appellants specify error to the use of the word "likelihood" in Finding of Fact 20 (R. 254). This finding that Pacific Farwest knew and fully appreciated that there was a likelihood of being sued, under all the circumstances,

is based largely on the oral testimony of Mr. DeCrane Cooke, President of Pacific Farwest. Cooke testified that he clearly understood there was a "distinct possibility" that Pacific Farwest would be sued in the event he released the fulfillment deed to Northwestern (Tr. 175). Cooke further testified that in order to secure Pacific Farwest in the event of litigation, Pacific Farwest obtained the indemnity agreement, two demand promissory notes and mortgage from Northwestern (Tr. 170, 175, 175, 180, 202-204). These facts, based on Cooke's testimony, completely supports this finding. Though appellants contend that the last sentence of Finding 20, "the delivery of the deed did not constitute a negligent act, error or omission," is a conclusion of law and not a finding of fact, this court ordinarily regards a trial court's determination that a party is or is not negligent as a finding of fact, subject to the "clearly erroneous" rule of review on appeal. *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745 (9th Cir. 1960).

2. Finding of Fact 22

Appellants specify error to the court's finding that the original complaint in State court charged Pacific Farwest with fraud and did not allege a claim within appellee's policy. This contention has been fully refuted heretofore in the brief (Appellee's Brief, pp. 13-16). This finding is based on the original complaint and the policy of insurance, both documents in evidence, and is clearly correct (Ex. 1; Ex. A-20).

3. Finding of Fact 30

Appellants object to the second portion of Finding 30 (P. 257) on the ground that the forwarding of the amend-

ed complaint by the assured, when requested by appellee's counsel, was not a condition precedent and further that appellee had not made sufficient effort to obtain the documents. Whether the requirement of the policy is a condition precedent is clearly a question of law and this subject has heretofore been discussed (Appellee's Brief, pp. 31-33). Whatever burden is placed upon the insurer to obtain the cooperation of the insured in such matters as attending trial, the authorities cited by appellants do *not* impose upon an insurer an affirmative obligation to solicit tender of defense or solicit proper notice of claim, of which forwarding the suit papers is an essential. The policy puts this obligation on the assured, not the underwriters. Finally, the testimony of Mr. Yates, clearly established that his determination not to furnish the pleadings, documents and information requested was purposeful and hence was intentional (Tr. 85, 94-5).

4. Findings of Fact 31, 32 and 33

Appellants except to all but the first sentence of Finding 31 and all of Findings 32 and 33, on the grounds that the Findings deal with matters which took place subsequent to the trial of the State court action and that these Findings are allegedly in sharp conflict with the testimony. The Findings are fully supported by the testimony of witness Moss (Tr. 73-74), established by the documentary evidence admitted in the case (Ex. A-27, Tr. 97; Ex. A-28, Tr. 97), and not denied by assured's counsel Yates. And although the events occurred after the trial of the State court action had been concluded, they evidenced the continuing breach by the assured of the cooperation clause of the policy and the facts are therefore both material and relevant. Appellee submits that had

assured's counsel Yates furnished the documents requested, and responded to Exhibit A-28 concerning prospective appeal, underwriters might well have determined to finance an appeal rather than await the present suit on the policy. However, the assured's continued non-cooperation made these alternatives impossible.

5. Finding of Fact 41

Appellants specify error to Finding 41 that appellants did not prove by a preponderance of the evidence that Pacific Farwest's delivery of the deed was a violation of legal duty owed to appellants. Appellants had signed bilateral escrow instructions and had not revoked them. They had no right to instruct the escrow agent not to deliver the deed unless the purchaser, Northwestern, had not complied with its obligations under the master real estate contract. In the court below appellants did not prove that the purchaser had not complied and thus did not prove that Pacific Farwest was not within its rights as escrow holder in releasing the deed. Further, no evidence of any kind was introduced relating to the amount of damages, even assuming liability was established.

E. The District Court Correctly Denied Appellants' Motion for Summary Judgment

Prior to trial, cross motions for summary judgments were presented to the District court. Appellee submits that based on the agreed facts in the pre-trial order, the District court was correct in denying appellants' motion for summary judgment, but erred in denying appellee's motion for summary judgment. However, the District court wished to try the case on its merits with full evidence. The refusal to pass on the motions for a summary judgment was within the sound discretion of the court, and is

not reversible error. *Woods v. Robb*, 171 F.2d 539 (5th Cir. 1948).

V.

CONCLUSION

When insureds or their judgment creditors have little law to support them, they invariably urge considerations of public policy, social justice and the time-honored cry of "ambiguity," in their attempts to recover against an insurer. This case is no exception, and appellants ask this court to reverse the judgment below not so much because the law compels it, but rather because this court, as an instrument of social justice, should abhor the thought that the appellants' plight should befall anyone and that one be without recourse." (App. Br., p. 69). Because the assured here used the words "Bonded and Insured" at the bottom of its stationery, appellants say that appellee must pay the loss as a matter of social justice, despite the obvious fact that no court has ever suggested that a representation that one is insured is tantamount to a representation that all legal liabilities are covered by such insurance. Similarly, there is no evidence whatever in the record to support appellants' suggestions that appellee and its counsel were motivated by the Machiavellian considerations ascribed to them, so as to produce a "synthetic defense." The trial court certainly made no such finding, and we suggest that this court should respectfully decline to substitute imagined motivation for facts and law in determining the issues of this case. This court sits as a court of legal review, not as an instrument of social justice whose function is to spread the loss so that no one member of the public shall have to bear it.

The District court correctly concluded that appellee was not bound by the State court judgment of liability against Pacific Farwest. There is no legal authority to support appellants' contention that appellee should have solicited a tender of defense from Pacific Farwest at the risk of being bound by the State court judgment. The District court was also correct in holding that the assured breached an express condition precedent of the policy when it intentionally failed to furnish the amended complaint at the request of the insurer, because the policy placed the burden on the assured to give notice and furnish information. Finally, the District court was correct in holding that the assured's intentional business gamble, with full appreciation of the risk which resulted in the liability judgment against it, was not the kind of conduct insured by the escrow errors and omissions policy here in issue.

If sound principles of law be substituted for sympathy for appellants' plight, the judgment of the court below was correct and must be affirmed.

Respectfully submitted,

LANE, POWELL, MOSS & MILLER
THOMAS S. ZILLY

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

THOMAS S. ZILLY

Of Attorneys for Appellee

APPENDIX A
PLAINTIFFS' EXHIBITS

<i>No.</i>	<i>Document</i>	<i>Page of Transcript where</i>	
		<i>Offered</i>	<i>Admitted</i>
1.	Certificate of Insurance.	16	18
2.	Judgment & Decree, Cause No. 630 691.	18	19
3.	Amended Complaint, Cause No. 630 691.	19	19
4.	Findings & Conclusions of Law No. 630 691.	20	20
5.	Letter from Jeremiah M. McCormick to Gordon W. Moss, dated May 20, 1965.	21	21
7.	Letter dated December 1, 1964 to Wood Ins. from Pacific Farwest Mortgage & Escrow	21	21
8.	Letter dated May 26, 1964 to Howard R. Kienle from Pacific Farwest Mortgage & Escrow.....	27	29
9.	Letter dated 12/5/1964, to Voigt- Walker & Co. from Wood Ins. Co.....	105	106

DEFENDANTS' EXHIBITS

<i>No.</i>	<i>Document</i>	<i>Page of Transcript where</i>	
		<i>Offered</i>	<i>Admitted</i>
A- 2.	Sellers' Escrow Instruction	148	149
A- 7.	Letter dated July 17, 1964 from attorney Gouge to Pacific Farwest.	142	146
A- 8.	Letter dated July 23, 1964 from attorney Carpenter to Pacific Farwest	142	146

DEFENDANTS' EXHIBITS (Continued)

No.	Document	Page of Transcript where	
		Offered	Admitted
A- 9.	Letter dated 7/28/64 from attorney Youngberg to DeCrane Cooke of Pacific Farwest	164	165
A-13.	Mortgage to Pacific Farwest from Northwestern Utilities, dated 8/18/64.	176	177
A-19.	Letter dated Aug. 20, 1964, from Pacific Farwest to Fidelity Savings & Loan Assn.	178	179
A-20.	Complaint, Cause No. 630 691.	67	70
A-21.	Copy of letter from Yates & Yates, dated 12/7/64 to Voigt-Walker & Co.	67	70
A-22.	Letter from Gordon W. Moss, dated 2/15/65 to Yates & Yates.....	60	60
A-26.	Letter from Gordon W. Moss, dated 2/24/65 to Yates & Yates.....	61	63
A-27.	Letter from Gordon W. Moss, dated 12/1/65 to Leslie M. Yates	95	97
A-28.	Letter from Gordon W. Moss, dated 5/18/66 to Leslie M. Yates.	95	97
A-29.	Oral Opinion, Cause No. 630 691.	206	209
A-30.	Original Indemnity Agreement.....	201	202
A-31.	Promissory Note dated 8/19/64.....	203	204

APPENDIX B

INDEMNITY AGREEMENT

THIS AGREEMENT, entered into this 18th day of August, 1964, between NORTHWESTERN UTILITIES, INCORPORATED, a Washington corporation, WILLIAM A. CANNON and MELVIN D. FREIMUTH, individually, hereafter called Indemnitors and PACIFIC FAR WEST MORTGAGE AND ESCROW COMPANY, a Washington corporation, DE CRANE COOKE and CYRIL H. DYE, hereafter called Indemnitees,

WITNESSETH:

WHEREAS, Indemnitees are closing in escrow a certain real estate transaction between Northwestern Utilities, Incorporated, as Purchaser, and Howard R. Kienle and Dora Joy Kienle, his wife, as sellers, pursuant to a real estate contract entered into between the parties and executed April 12, 1964, and

WHEREAS, Northwestern Utilities, Incorporated, has fully performed as Purchaser its obligations in escrow, including the tender of certain real estate contracts to said Kienles to secure the fulfillment or warranty deed held in escrow and

WHEREAS, Northwestern Utilities, Incorporated, has demanded of Indemnitees that said fulfillment or warranty deed executed by said Kienles to Northwestern Utilities, Incorporated, be filed and the escrow closed and

WHEREAS, the Indemnitors have agreed to indemnify the Indemnitees and to hold said Indemnitees harmless from any and all future suits, claims or demands of any nature against said Indemnatee arising out of the closing of said escrow.

NOW, THEREFORE, in consideration of the delivery by Indemnitees of said deed, Indemnitors do hereby jointly and severally agree that they will at all times hereafter indemnify Indemnitees and each of them against any loss, damage, suit or expense of any kind or nature which Indemnitees may sustain or incur by reason of the closing of said escrow transaction by the filing of said fulfillment or warranty deed from said Kienles to Northwestern Utilities, Incorporated and as further consideration Indemnitors have on this date, executed two promissory notes to Indemnitees secured by certain assets of Indemnitors. One note is a demand note for \$1,500.00. The other is for \$1,500.00 payable in the event suit is commenced as a result of the release of the said deed. As to the cash indemnity, Indemnitees have the right to keep a portion of said funds in payment of such expenses as they have incurred to this date and will incur in the future. Such expenses will include, but will not be limited to, attorney's fees, time loss of Indemnitees or any of them and such other loss and in such amounts as Indemnitees may determine in their sole discretion.

IN WITNESS WHEREOF, the parties hereto hereunder set their hands and seals the day and year first above written.

NORTHWESTERN UTILITIES, INCORPORATED
NORTHWESTERN UTILITIES, INC.

BY WILLIAM A. CANNON,
WILLIAM A. CANNON, President
MELVIN D. FREIMUTH, Secretary
MELVIN D. FREIMUTH, Secretary
WILLIAM A. CANNON, Individually
WILLIAM A. CANNON, Individually

MELVIN D. FREIMUTH, Individually

MELVIN D. FREIMUTH, Individually

PACIFIC FAR WEST MORTGAGE & ESCROW
Co.

PACIFIC FAR WEST MORTGAGE & ESCROW
Co. INC.

By DE CRANE COOKE, President

DE CRANE COOKE, President

CYRIL H. DYE, Secretary-Treasurer

CYRIL H. DYE, Secretary-Treasurer

DE CRANE COOKE

DE CRANE COOKE, Individually

CYRIL H. DYE

CYRIL H. DYE, Individually

APPENDIX C

May 24, 1965

Messrs. Yates & Yates
Attorneys at Law
Suite 203, 1800 Westlake Ave. North
Seattle, Washington 98109

Attention: Leslie M. Yates

Re: *Kienle v. Pacific Farwest Mortgage
& Escrow Co., Inc., et al—*
Cause 630691—Our File 26097

Dear Sirs:

We enclose copy of letter received from Attorney McCormick. Please furnish us a copy of all relevant pleadings subsequent to the original complaint and answer, including particularly the amended complaint. Advise also the current status of Pacific Farwest Mortgage & Escrow Co., Inc. and whether you intend to continue to defend your client in this case.

We have never been provided with a copy of the earnest money receipt and agreement, the real estate contract, or the escrow instructions and would appreciate your furnishing us a copy of the same; if there were no written escrow instructions please advise.

Underwriters continue to reserve all rights under the applicable Errors & Omissions Certificate. ..

Yours very truly,

EVANS, McLAREN, LANE, POWELL & MOSS
ss/Gordon W. Moss

GWM:AM

enc.

2cc Voigt, Walker & Co., Inc.

**United States Court of Appeals
For the Ninth Circuit**

HOWARD R. KIENLE and DORA J. KIENLE, his wife,
Appellants,

vs.

ALAN BOUD FLACK, an underwriter at Lloyds,
London, on behalf of himself and all other
Underwriters at Lloyds, London, Subscribing
Certificate of Insurance No. 18201 issued by
VOIGHT, WALKER & Co., INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANTS' REPLY BRIEF

ORVIN H. MESSEGEY

and

JEREMIAH M. MCCORMICK

Attorneys for Appellants.

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500 Wall Street
Seattle, Washington 98121
MA 4-7572

FILED

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and all other Underwriters at Lloyds,
London, Subscribing Certificate of In-
surance No. 18201 issued by VOIGHT,
WALKER & Co., INC., *Appellee.*

No. 22465

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANTS' REPLY BRIEF

A. Observations Concerning Appellee's Counter
Statement of the Case.

Appellee's counter statement of the case emphasizes the collateral indemnity agreement reached between the insured escrow, Pacific Farwest, and the purchaser of the real property, Northwestern, which the former required before it would release the seller's deed. Indeed, the emphasis on this circumstance produces an expectation in the reader's mind that some substantive legal significance will later be claimed to therefrom flow, but we are no more edified than we were by appellee's answer to appellant's pre-trial interrogatory concerning the same matter (Interrog.

10, R 43). When one reflects that the “phony” corporation with whom the escrow was dealing was a purchaser who could show a net-worth Dun & Bradstreet report of almost a million dollars (p. 5, lines 19-21 of Exhibit 4), must not one reasonably conclude that the escrow probably thought it was carefully immunizing from liability both itself and its insurer if it later should be held to have been in error? Does this not argue strongly *against*, rather than support, any suggestion of indifference toward exposing the insurer to risk? No law is cited in that brief, and we are sure none can be found, which makes this act of precaution *substantively* relevant in any way. Concededly, it is probative of the fact that the deed was released deliberately, after a business decision to release it, but, throughout this litigation, that fact has been admitted.

On page 6, appellee states that Mr. McCormick wrote to Mr. Moss “advising him that the allegation against Pacific Farwest of collusion with Northwestern had been withdrawn and that an amended complaint had been filed.” This letter, Ex. 5, also plainly stated that “all parties have been served.” Might this omission have been prompted by awareness of this court’s approval of *actual notice* of service as a substitute for delivery of suit papers? *Indemnity Ins. Company of North America vs. Forrest*, 44 F2d 465 (CA 9, 1930).

On page 7 it is stated, in reference to the *post-trial* telephone conversation of November 3, 1965, that “(T)his was insurer’s counsel’s first notice of the existence of an indemnity agreement.” This, despite the testimony of insurer’s counsel that ten months earlier, on January 6, 1965, Mr. Yates had told him that Yate’s client, Pacific Farwest “. . . had received, \$1,500.00 in cash as an indemnity fund from the buyer,

Northwestern Utilities, to cover costs and attorney's fees, and that fund was garnished by the plaintiffs subject to Mr. Yate's rights as counsel" (Tr. 58, lines 20-24). This collateral arrangement also was referred to in Mr. Moss's February 15, 1965 letter declining coverage (Ex. A-22, Tr. 60).

Further, appellee's counter statement quite superfluously emphasizes the belated and unproductive *post-trial* letter writing activities of its counsel. Referring to page 7 of appellee's brief we respectfully ask this Court to carefully ponder such a statement as:

"Mr. Moss advised Yates that underwriters *might* want to finance an appeal if, after review by appellee's counsel of the documents and evidence, it was counsel's recommendation that an appeal was indicated." (Emphasis ours.)

Viewing this in its actual time setting, does not the slightest emphatic reflection illumine how facetious, if not audacious, such a suggestion would have appeared to Mr. Yates, the insured's counsel? Here was the insurer's counsel, who had unequivocally made clear his client's position that mistaken business decisions were not within coverage, asking an attorney (whose client was "broke") to pay a court reporter \$1,000.00 for the transcript of seven trial days of testimony (Tr. 73) so that the former might decide *whether to recommend* that the insurer pay for it!

B. Reply to Appellee's Argument.

Appellants admit that they made no effort to retry the original state court action (Br. 11), i.e., the previously decided issue of the insured escrow's liability to the appellants. Throughout, our contention has been that the insurer is bound by the state court judgment and that judgment's essential supportive

findings.¹ If that judgment is held to be properly open to attack, it still remains *prima facie* correct, so that it is appellee's burden to prove that it should not be binding. *Costello v. Bridges*, 81 Wash. 192, 142 Pac. 687; *National Surety v. Fry*, 86 Wash. 118, 149 Pac. 637; *Kibler v. Maryland Casualty Co.*, 74 Wash. 159, 132 Pac. 878. This it did not do — nor was it so expected. It was well understood by the original district court judge² that it might never be necessary to re-try this previously litigated issue. It was for this reason that the court entered its order of May 24, 1967, setting the trial on July 5 to be on all issues “*except* liability of Escrow Co. to the plaintiffs” (Emphasis ours) (R. 292). This order was never vacated.

Appellants heartily agree with the basic rule quoted, on page 12 of appellee's brief, from *East v. Fields*, 42 Wn. 2d 924, 259 P2d 639. Our differences emanate, not from what the law *says* but from what the law *means*. Appellee, as did the trial judge, seems to insist that compliance consists of nothing less than the *precise formalities* which fit the *language* of such rules. Appellants insist that the law requires only such compliance in *substance* as fits the *purpose* underlying the decisional promulgation of such rules. For example, by ignoring our citations of authority approving the receipt of notice from other sources than the insured, we presume appellee continues to champion a literal interpretation of the requirement that “the *insured* must give notice.”

Appellee stresses the importance of distinguishing between the original complaint and the amended complaint in determining whether it had adequate notice

¹2 Freeman, Judgments, Sec. 693, 708.

²The Honorable William J. Lindberg.

of the proceedings and had an opportunity to defend. Assuming, *arguendo*, that the original complaint did in fact allege dishonesty so as to come within the policy's exclusionary clause, 6 b, still, when the insurer was admittedly notified that the allegation of collusion had been withdrawn, should not the insurer plainly have known that the plaintiffs were now seeking damages based upon the innocent, albeit legally wrongful, release of their deed? Moreover, knowing the probative difficulties inherent in fraud actions and the exacting quantum of proof required, should not there be an ever-present awareness on the part of insurer's counsel that a case alleging fraud, even without pre-trial amendment, may, and often does, result in a judgment predicated upon no more than an innocent breach of duty? Is this not quite different from the much more tangible facts which often fit exclusionary clauses, such as being an employee, driving a vehicle without permission, or assaulting someone? Even where the *duty* to defend existed, it has recently been held, in respect to a professional "errors and omissions" policy, that the insurer may not rely upon general allegations of conspiracy in declining the defense. *St. Paul and Marine Ins. Co. v. Icard*, 196 So. 2d 219 (Fla. 1967).³

Important to notice is that, here, we are not even specifically concerned with the criteria for determining whether or not there arose a *duty* to defend. By its own policy appellee absolved itself of any duty to defend in any case. No *demand* for participation could rightfully be made by the insured. But the same policy, figuratively speaking, tendered to its author the opportunity to *take over* the defense of any claim *if it so desired*. Clearly, Pacific Farwest's notice to

³This is the same jurisdiction whose law was being applied in *Sussman*.

appellee insurer of the pendency of the action was at least a clear invitation for its assistance.⁴ If it chose not to take over, or even to assist, as it had a perfect right to do, after it was put upon notice that the pleadings no longer alleged collusion against its insured, it should now abide the gamble. As is stated in the same Section 107 of the Restatement of Judgments as is cited by appellee (Br. 18),

“If he fails to give this assistance at the time when it is of greatest importance, it is fair that he should abide by the result of the trial.”

On page 12 of its brief appellee rather deftly edits what it quotes from the Restatement of Judgments. This court will note that the section concerns itself largely with the general principles of common law indemnity flowing from such relationships as master-servant, principal and agent, etc. On page 515, we note instances of relationships where “a request to defend and a tender of control can normally be inferred upon a seasonable notification of the pendency of the action, since such notification would obviously be only for the purpose of inviting in the indemnitor.” This concept is as old as Wall. See *Robbins v. Chicago*, 4 Wall (U.S.) 657, 18 L Ed 427.

Particularly, we feel that the insurer's failure to participate in the state court action should be viewed with the indemnifying clause of the policy in mind. In order for the duty to indemnify to arise it would seem unnecessary that the insured's liability arose because a negligent act or an error “*was committed*” in fact, but it is sufficient if such act or error “*may have*

⁴Presumably this is admitted. “Defendant was given notice and the opportunity to defend the original complaint” (Def. Tr. Br. p. 2, lines 11-12, R 88). The very fact the insurer declined makes clear that notice was regarded as an invitation.

been committed, on the part of the Assured...about the conduct of any business...in their professional capacity as Escrow Agents" (Ex 1, Tr. 18, Proviso and Condition 2).

Appellee's view, accepted by the trial judge, that the amended complaint became a completely *de novo* claim and that, upon its filing, the original complaint for all purposes instanto vanished — that the filing, serving and forwarding to the insurer of the original complaint must now be entirely ignored — is simply not realistic. Can justice rooted in reality condone any such artificiality? Truth implores this court to once more free it from the fetters of form. The "new proceeding" concept was thought to be an unbemoaned casualty of the federal procedural revolution. Certainly an original complaint has sufficient existence that amendments may relate back to it even after a statute of limitation has run against it. FRCP Rule 15 (c).

See Moore, Federal Practice, Second Ed. p. 1045-46 as to origin of the "new proceeding" concept respecting amended complaints.

The very dearth of authority which requires appellee to rely upon such cases as *General Insurance Corporation v. Harris*, 327 SW 2d 651, and *State Mutual, Etc. Insurance Co. v. Watkins*,⁵ 180 So. 78, is in itself revealing. On the somewhat remarkable facts of these cases, it might be said that both claimants received undeservedly respectful treatment by the appellate courts.

On page 17 of its brief appellee notes that Mr. Mc-

⁵We do note from *Watkins* that there was used the device of getting information from the court files.

Cormick sent his letter advising of the amended complaint to Mr. Moss, who had closed his file, and not to the underwriters. To counter any purposeful intimation that Mr. Moss was not the insurer's counsel at this time, we respectfully call attention to the insurer's answers to interrogatories, particularly numbers 2 and 6 (R. 40-4). By its answer to number 6, of course, the *insurer admitted* receiving notice that the amended complaint had been filed. Exhibit 5 shows conclusively that the same notice *advised of the service of process*. In *Metropolitan Cas. Ins. Co. v. Colhurst*, 36 F2d 559 (9th Cir. 1930) which appellee, quite curiously and remarkably, states "is in complete accord with appellee's position" (Br. p. 29), this court stated at page 561,

"The important consideration was that appellant *should be advised of the service of process* so that it should appear in response thereto, in the assured's name, and make defense." (Emphasis ours.)

A few months after this court decided *Colhurst*, its decision in *Indemnity Insurance Co. vs. Forrest*, 44 F2d 465 (9th Cir. 1930) showed quite conclusively that almost forty years ago this court would not be enslaved by form over substance in such matters and certainly no capitulation has since been noticed.

Moreover, we submit that, here, the circumstances surrounding the insurer's declination of coverage were certainly as inducive of a belief in the futility of forwarding the amended complaint as were the circumstances inducive of a belief in the futility of filing an amended proof of disability in *Pagni v. N. Y. Life Insurance Company*, 173 Wash. 322, at 334, 23 P2d at

p. 10.⁶ Too, in the cited case, filing of proofs appears to have been a condition precedent. Here, forwarding of suit papers was not.

Repeatedly, throughout appellee's brief it claims that it was *prevented* from defending. Was it really? It is to be remembered well that, prior to trial of the state court action, appellee requested *once and once only*, a copy of the amended complaint — and this request was made of an insured's counsel who it must have expected would consider it idle to respond, in view of having been at least twice told⁷ that damages resulting from deliberate business decisions would not be covered. Even so, we dare say the letter of request was still written with breath held and fingers crossed. *This single letter carefully avoided mention of any policy condition.* And counsel must have well known that just a copy to Mr. McCormick would have prompted a flurry of activity.⁸

When one considers counsel's answer to the trial judge, "Well, your honor, the answer is I had no knowledge of the Amended Complaint until after the trial" (Tr. 55, lines 5-7), at the same time contem-

⁶"Where the denial of liability on the part of an insurance company is of such a character, or made under such circumstances, as reasonably to induce a belief that the submission of further proofs will be useless, a waiver of defects in, or insufficiency of, the proofs furnished and a waiver of the requirement to furnish additional proof will be effected. The insured is not concluded by the proofs submitted, and may, within the period of limitation, prosecute an action for collection of disability benefits. The waiver would not be affected by the submission of further proofs of disability after denial by insurer, under facts such as obtain in the case at bar, of liability after receiving first proofs of disability" (p. 334).

⁷(Tr. 59, lines 1-7 and Ex. A-22, Tr. 60).

⁸The fact that the insured's judgment creditor was willing to aid the insurer with its investigation has most recently been noted by the Supreme Court or Arizona as one of the circumstances which caused that court to excuse a delay of two years in giving notice to one insurer and of 17 months to another. *Lindus v. Northern Insurance Co. of New York*, 438 P2d 311 (Ariz. 1968).

plating the number of times counsel must have been in the King County Court House during those five months of quiescence, one must admire the self-discipline that resisted even a peek. Or, would curiosity be wholly lacking because any attorney who had looked at the "release of the deed" facts alleged in the original complaint would know how they would look with an allegation of collusion withdrawn?

Despite appellee's ingenious attempt to create a condition precedent suit-forwarding clause (Br. 23), the fact remains that nowhere in this policy may one be found. This being so, and even radically assuming that failure to place the amended complaint right side up into the hands of insurer's counsel prevented it from defending, *where is the prejudice?* The insurer's interests in the state court action were *derivative* only, and they were vigorously and skilfully represented. Even if the insurer had sought to intervene it might properly have been denied the right to so do upon the state of this record. WCR 24, FRCP 24, *Farmland Irrigation Company v. Dopplmaier*, 220 F2d 247 (CA 9, 1955).

Again, repeatedly, appellee persists in its claim that failure to *deliver to it requested documents* was a violation of a condition precedent requiring the insured to "*give information.*" Abandoning, only momentarily, our position that the first paragraph of Provisos and Conditions 5 is susceptible of a disjoinder of clauses which saves the "give information" clause from being a condition precedent, and, conceding arguendo, that despite the scrivener's use of the singular, both clauses state conditions precedent, are we not still compelled to narrowly and strictly construe the words, "give information"? Hindsight-

edly, the comfort which would have attended use of such additional words as "furnish documents" is obvious. But such simple words were not used and such attendant comfort to the insurer is lacking by their absence. "Give information" means no more than "to inform." "Inform" means "to communicate knowledge to; to make acquainted; to acquaint; advise; instruct; tell; notify; enlighten." Webster's International Dictionary, Second Edition, Volume 1.

Sec. IV C of Appellee's brief (pp. 33-51), concerns the question of whether the wrongful release of the deed comes within the language "negligent acts, errors or omissions." This section of argument is prefaced by the observation that this "...is doubtlessly the most intellectually challenging issue in this case." Could this be a concession? Might it be that the mental tease is produced because the clause is susceptible to two constructions? Rarely ever is the obvious "intellectually challenging."

Admittedly, the insured was an escrow agent. In the course of its business as such it was found to have wrongfully released from its custody the deed to the appellant's property. It intended no harm;⁹ it believed it had a legal right to so do. It had available to it the right to interplead the parties and was so advised by its counsel. It omitted doing this. It released the deed after twice being warned not to release it. In one breath appellee feigns difficulty in finding that such an escrow agent was negligent. It has insisted throughout that the escrow acted within its legal rights. In the next breath, it seems to argue for wilful misconduct. We agree that if such misconduct mea-

⁹No contention has ever been made that the harm to the Kienles was ever intended.

sures up to the standard of the reasonably prudent professional escrow agent then negligence has not been shown. But, does it not fall below that standard as a matter of law?

Although, through the print we detect a wink, appellee, twice in its brief, seeks to cast aspersions on the state court's findings because they were drafted by appellants' present counsel (Br. page 8 and page 37, footnote (7)).

We are criticized for having included words not used by Judge Shorett in his oral opinion. We respectfully submit that those findings, which were closely examined by the court and by four opposing counsel, follow the court's oral opinion ever so much more closely than appellee's proposed and accepted findings followed the district court's oral opinion in the instant case.¹⁰ The law in both forums is essentially the same. (*Feree v. Doric Co.*, 62 Wn. 2d 561, 383 P2d 900).

Suppose a general medical doctor, contrary to the instructions of his patient, performed radical surgery, after first having consulted specialists who recommended non-surgical conservative treatment, the doctor honestly believing he was doing the right thing, and the patient died. How successful would be his professional errors and omissions carrier in asserting a defense of non-coverage because this was a deliberate, intentional act as a result of a professional decision and in direct violation of his patient's instructions?

¹⁰Although appellee had no right to go behind the state court findings (because, whether binding or not, they are the findings of the court and control over an oral opinion) still we cannot resist reference to the state court's particular notice in its opinion from the bench of what, as a professional escrow agent, Pacific Farwest, should have known. The court stated, in addition to finding a breach of contract, "I think the escrow here violated his plain duty." Certainly much of his oral opinion sounded in tort.

Lest it be argued that employment of the language “*malpractice*, errors and omissions” is a basis for distinction, it must be remembered that malpractice is simply the failure to fulfill the duty which the law implies from the contract of employment, to exercise a certain standard of care, skill and diligence. *Richardson v. Doe*, 199 N.E. 2d 878 (Ohio, 1964). Essentially the same test applies throughout the professions. Upon the above hypothetical facts, can anyone seriously doubt what the Washington Supreme Court would hold if such insuring clause, instead, used the words, “negligent acts, errors or omissions”? (*Sutherland v. Fidelity & Casualty Co.*, 103 Wash. 583, 175 Pac. 187).

It is likely that the understandable tendency to apply old imbedded concepts of insurance law to a case involving a relatively new area has been largely responsible for the trial court’s errors.¹¹ Appellee complains that to hold it bound by the state court judgment would make it a “partner” with its insureds in the conduct of their businesses — that its liability, in effect, would be dependent upon its insureds’ exercise of their individual judgments in the conduct of their specialties. Quite true, if that exercise of judgment falls below the acceptable standard governing a particular profession, and harm thereby results. This no doubt accounts for the rather substantial premiums charged for such coverage — as well as accounts for the type of questions asked upon application.¹²

¹¹See article “Professional Liability of Architects and Engineers” in 1964 Insurance Law Journal 461 and article in 1966 volume, p. 746.

¹²For example, the application here, which was made part of the policy, asked the prospective insured whether or not there was an attorney connected with the firm, its experience as an escrow, whether any prior claims had been made against it, etc. (Ex. 1, Tr. 18).

Appellee's persistent argument that "intentional and wilful" acts are not covered is based upon thin-shelled semantics. Certainly, when the trial judge employed these words in his findings of fact, he could not have intended to use "wilful" in the sense that the actor intended that Mr. and Mrs. Kienle would lose their property without compensation. This has never been asserted and the record is devoid of any evidence to support such a finding if that meaning is sought to be attributed to it. And we do not so read appellee's brief.

Despite the language quoted from *Adkisson v. Seattle* (Br. 40), a negligent act is ordinarily intentional in the sense that it is a product of the actor's volition. The conscious driver who negligently uses an exit to enter upon a freeway fully intends to steer as he is steering; take away his volition — e.g. a heart attack has caused his vehicle to wander onto the exit, or someone had a gun in his ribs — then, negligence disappears.

In *Ferrell v. Cronath*, 67 Wn 2d 642, 409 P 2d 472, the escrow *intended* to file the conditional sales contract in the county where he did file it. He was negligent in not having filed it in the proper county.

In *Kirby v. Woolbert*, 48 Wn 2d 141, 291 P 2d 666, the escrow deliberately turned over money to the executrix contrary to instructions. The decision states, p. 143: "The excess was paid by the escrow company by mistake and upon the representation of the executrix' attorneys that the amount was due her." The court characterized this as a "breach of its undertaking."¹³

¹³Here, Northwestern's attorney convinced the insured that Northwestern was legally entitled to the deed.

In *Gray v. England*, 69 Wn 2d 52, 417 P 2d 357, Lawyers' Title Insurance Company acted intentionally, doubtlessly after having first decided it had a right to extinguish the escrow fund. "When Lawyers extinguished the fund without giving reasonable notice to Gray and/or impleading the \$2,300.00, it did so at its peril...."

In *St. Tammany Bank and Trust Co. v. Winfield*, 254 Fed. 785 (5th Cir. 1918), when the bank delivered the bills of sale to Mr. Wertz it did so intentionally.

In all such cases¹⁴ it is negligence for the escrow to breach his duty.

In any such case, is anything to be accomplished, and should the law require, particular labels? Whether we say that an escrow has breached his contract of employment, or has violated his trust, or has failed in his duty, or has been unfaithful to his undertaking (things that reasonably prudent escrow agents do not do) — in any such case, does it not necessarily mean that his conduct in the premises has been negligent — that it has fallen below the required standard of exercising the skill and care, or possessing the knowledge and judgment that would be exercised or possessed by

¹⁴Appellee seems to suggest that in all such cases, inadvertance or error or omissions occurred somewhere in the escrow's course of conduct. The state court findings (Ex. 4, Tr. 20) show the following:

Mistaken reliance on Northwestern's assurances.

Failure to discover that these contracts were in violation of the platting laws.

Failure to examine the contracts being used as "payment."

Mistakenly delivering the deed believing the plat had been approved when it was not approved until later.

Failure of an experienced escrow to be alerted by the peculiarity of the "payment" clauses.

Failure to determine that the County Engineer had not yet received the required improvement bond.

the reasonably prudent escrow agent? See *Spoziani v. Millar*, 30 Cal. Rptr. 658, 666-667. Those who would make of the law a game of pinning labels are usually fearful of examining the substance underneath.

On page 37, appellee states: "In contrast, in the state court action by Kienle, the only *facts essential to the judgment* against Pacific Farwest was that it delivered the deed in violation of the seller's instructions." Must not such an act be held, as a matter of law, to fall below the required standard?

We submit that too often in its brief appellee drops a small square peg into a big round hole and exclaims "See, it fits!" For example, the language quoted from *Adkisson v. Seattle*, 42 Wn 2d 676, 258 P2d 461, pertains exclusively to bodily injury or death. It concerns acts which are committed or omitted in *reckless disregard of human bodily safety*. (See Restatement of Torts, Sec. 500). By holding that the unlighted pile of dirt, under the circumstances, posed a jury question, the court avoided, in the interest of *plaintiffs' recovery*, the bar of contributory negligence. The 1904 *Nome Beach* case (Br. 42) involved damage to a cargo under an "all risks" policy governed by a California statutory "exclusion" clause, expressly excluding wilful acts. The instant policy contains no such clause. *Town of Tieton* cited on page 40 involved an "accident" policy — which appellee at times seems to subtly suggest the instant policy is — but which it clearly is not. The most impressive thing about the cited English cases is the fact that appellee found it necessary to travel such a distance.

We submit that, the resort to Dr. Curme's work on grammar, defeats rather than supports appellee's con-

tention when the quoted passage is properly read and applied. Appellee simply applies the rule in a manner which first assumes the words mean the same thing when abundant legal authority says otherwise. The presumptively, carefully written policy language, here, no more constitutes an "oratorical triad" than somewhat similar words did in *Burns v. American Casualty Co.*, 273 P2d 605 (Cal. 1954).

Appellee makes the concession on page 49 that "this court need not hold that every intentional act is beyond policy coverage". This "little bit pregnant" type of argument leaves much to be desired. Certainly, the single case cited does not define the boundaries of what the underwriters have in mind. Perhaps, they prefer to make a decision as to which cases fit their thinking after the fact of each loss. It strikes us that this is too much like "I'm thinking of a number from 1 to 10; if you guess it, you win."

Quite mindful of the usual and understandable displeasure of courts with overstatement, we earnestly and most thoughtfully submit that appellee insurer's defense in this case consists of little more than a wondrously woven web of words.

In most instances appellate decisions have been artfully dissected and certain language cleanly extracted with little regard to their underlying facts.

Such cases as *Van Riper v. Const. Gov't League*, 1 Wn.2d 635, 96 P.2d 588, show how far the Washington court will go to find coverage, even where there is a specific exclusion of *criminal* violations of law. The court refused to be bound by the legal definition of "criminal." There can be little doubt but that the state court would have construed "negligent

act" as broadly as a layman might.

Before concluding, it may be well to remind the court that any acts of appellee of which complaint may have been made herein or any criticism of motives are in no sense directed at its counsel. The insurer simply determined that the better gamble was to forego a defense on the merits and, instead, to pursue the course that has been pursued. As is often the case, the insurer has been represented by most capable counsel whose personal integrity is a matter of common knowledge.

In conclusion, appellants urge that all of the *material* issues in this case are issues of law. They have been so regarded by both sides throughout. The statements made by appellants, appearing at the top of p. 3 of their opening brief have been accepted without quarrel by appellee. This court is certainly in as good a position as the trial judge to pass upon these legal issues. We respectfully submit that preservation of sound law requires a reversal herein with directions to the court below to enter judgment in favor of Mr. and Mrs. Kienle.

Respectfully submitted,

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Underwriters at Lloyds, London, Subscribing
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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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United States Court of Appeals For the Ninth Circuit

HOWARD R. KIENLE and DORA J. KIENLE,
his wife, *Appellants,*

vs.

ALAN BOUD FLACK, an Underwriter at
Lloyds, London, on behalf of himself
and all other Underwriters at Lloyds,
London, Subscribing Certificate of In-
surance No. 18201 issued by VOIGHT,
WALKER & Co., Inc., *Appellee.*

No. 22465

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

FACTS OF JURISDICTION, RESUME OF PLEADINGS AND PROCEDURAL SYNOPSIS

Review is respectfully sought of appellee-insurer's successful avoidance of liability under a professional errors and omissions policy. The action was brought by appellants as third party judgment creditors of the insured, an escrow agent.

Plaintiffs-appellants, Kienle, husband and wife, and residents of Renton, King County, Washington, brought suit against the appellee insurer, Lloyds, (resident of Kingdom of Great Britian), in the Sup-

erior Court of King County, Washington, seeking payment from appellee, of a state court judgment earlier recovered against appellee's insured, Pacific Farwest Mortgage and Escrow Co. (R. 4). Appellee removed to the U.S. District Court, Western District of Washington, Northern Division, under authority of 28 U.S. Code 1441-1450 inclusive. (R. 1-8). Both amount and diversity were such as to come within the original jurisdiction of the District Courts by virtue of 28 U.S. Code 1331-59 inclusive. (R. 4, 54, 55; Tr. 24). This court is vested with appellate jurisdiction under 28 U.S. Code 1201.

Appellants' complaint generally alleged that Lloyds¹ was an alien insurer who had issued a \$100,000.00 escrow agent's errors and omissions policy to its insured, Pacific Farwest Mortgage & Escrow Co., and that said policy covered the \$49,247.50 judgment recovered by plaintiffs against the insured in King County Superior Court cause number 630691 and that the defense of the earlier action had been tendered to Lloyds and had been declined. (R. 4, 5).

After removal to district court, and the joinder of an additional party², appellee answered by admitting the policy of insurance as well as appellants' judgment against its insured and affirmatively pleaded six defenses. (R. 20-23).

After issues were joined and certain discovery procedures employed, a pre-trial order was entered (R.

¹The formal denomination of this defendant was later changed by agreed order. (R. 9).

²Although unlikely bed-fellows, it was insisted that the offending escrow agent be joined with appellants as a plaintiff. (R. 11 and 18).

54-82)³ which was characterized by substantial factual agreement — viewed by all counsel to be of such sufficiency so as to entitle their respective clients to a summary judgment. Both sides so moved. (R. 219, 221). Both motions were denied. (R. 237, 238). The two day trial that followed consisted mostly of re-establishing previously agreed facts.

At the conclusion of trial, the district judge rendered his oral decision in favor of the insurer, (R. 239-242; Tr. 249-252). The sole grounds announced for his decision being that, in the earlier state court action, the insured

“(1) did not give notice to defendant insurers of the amended complaint which was based upon a new cause of action, and (2) the insured did not furnish the suit papers in the state court action to which papers, under the policy provisions, the defendants were entitled and did request copies of without success. For those reasons the defendants are not bound by the state court judgment.” (R. 239-240; Tr. 249-250).

After discussing its reasoning and its reliance upon two cases⁴ cited by appellee, the court concluded its oral decision (except for certain post-trial procedural directions to counsel) by saying:

“The court, from the consideration of and upon such preponderance of the evidence, does find

³It will be noted that the trial judge did not have the benefit of participation in the pre-trial conferences wherein the several legal issues were informally discussed and formulated. This case was first assigned to the Hon. Wm. J. Lindberg, who held pre-trial hearings on May 19, 1967, and again on May 24, 1967, as shown by the docket entries. (R. 292).

⁴*Sussman vs. American Surety Co.*, 345 F.2d 679, (CA 5th, Fla. 1965) *Lawrence vs. Northwest Casualty Co.*, 50 Wn.2d 282, 311 P.2d 670 (1957)

the issues in this case in favor of the defendants and against the plaintiff." (R. 241; Tr. 251).

Upon the presentation of the Findings of Fact and Conclusions of Law, the court signed the twelve pages of the same as proposed by appellee, modifying them in two particulars which made them more favorable to appellee than as proposed. (R. 249-262). All of appellees's several contentions of law (except one which was not presented⁵) were accepted by the court. Thereafter, appellants' Motion for new Trial or Amendment of Findings was denied. (R. 283-284). This appeal follows. (R. 285-286).

STATEMENT OF THE CASE

In 1964, Pacific Farwest Mortgage & Escrow Co., (hereinafter called "Pacific Farwest" or "the insured"), in the regular course of its escrow business, served as escrow agent in the sale of certain valuable free and clear real property between appellants Kienle as sellers and a certain Northwestern Utilities, Inc., (hereinafter called "Northwestern"), as purchaser. The property consisted of a house located on about eight acres of land near Renton, Washington. Appellants never received a cent from this purported sale and they lost the title to their property as a result of the established fraud of Northwestern. (Ex. 4, Tr. 20).

A multiple-defendant action was brought in state court, and after the default of Northwestern, (whose officers had left the jurisdiction) was entered, trial was had against the remaining defendants. After

⁵The contention that this policy was strict indemnity and indemnified only against actual loss and not against liability.

seven actual days of trial and admission into evidence of over 100 exhibits, the state court judge, the Hon. Lloyd Shorett, determined the role played by each of the several defendants and the legal rights and obligations therefrom emanating, and, accordingly, gave judgment of dismissal for some and damage judgments against others. (Ex. 2, 4, Tr. 19, 20).

One of the defendants against whom liability was imposed was the escrow agent, Pacific Farwest, who is appellee's insured in the present action.

Caught between, on the one hand, insistent and threatening demands by purchaser-Northwestern for release of the deed (Ex. R. 9, Tr. 165, Tr. 193) and, on the other, the admonitions of appellants not to release it (Ex. A-7, Tr. 146; Ex. A-8, Tr. 146), Pacific Farwest succumbed to Northwestern's pressure, and, after deciding it was within its legal rights as an escrow agent to release the deed (Tr. 157, 167-168)⁶, it did release it.⁷ Specifically, the state court found, *inter alia*, that,

“ . . . it was not acting dishonestly or fraudulently, but that, in so doing, it was in error and said act amounted to poor judgment and negligence and a breach of its contract of escrow.” (Ex. 4, P. 12-15, Tr. 20).

Judgment was rendered against it. (Ex. 2, Tr. 19). Notice of appeal was given but it was not perfected.

At the time, Pacific Farwest was insured under the

⁶It will be noted that one of appellee's contentions of law below was that “ . . . Pacific Farwest, as escrow agent, was, therefore, legally entitled to deliver the fulfillment deed. . . .” (Pre-Tr. Ord., R. 68, l. 4-5).

⁷Obviously, the fraud of Northwestern would have failed of accomplishment if the insured had retained the deed pending a judicial determination of its rights and duties.

policy here in question, (Ex. 1, Tr. 18), the body of which for the court's convenience is reprinted herein as appendix B.

To accomodate the reader's mindset, we quote the following language pertinent to coverage:

“... Underwriters . . . do hereby agree to indemnify the assured . . . against liability and costs in respect to any claim or claims which may be made against the assured . . . by reason of any negligent act, error or omission whenever or wherever the same was or may have been committed or alleged to have been committed on the part of the assured . . . in or about the conduct of any business conducted by . . . the assured . . . in their (sic) professional capacity as Escrow Agents.” (Ex. 1, Tr. 18).

The policy contained only four exclusions:

“6. This Certificate Does Not Extend To Indemnify the Assured in Respect of Any Claim:

- (a) For libel or slander; or
- (b) Brought about or contributed to by the dishonesty of the assured or any of their employees; or
- (c) Based upon or arising out of an Act of Congress of the United States of America known as the “Securities Act of 1933”, approved May 27, 1933, or any amendment thereof or addition thereto; or
- (d) Based upon or arising out of any opinion of title on real estate rendered or furnished by the Assured or by any predecessor of the Assured.” (See Appendix B, page)

The insurer was not under a duty to defend claims

made against its insured but,

“2. Underwriters, if they so desire, shall be entitled at their own expense to take over and conduct in the name of the assured the defense or settlement of any claim.” (Provisos and Conditions No. 2 of Ex. 1, Tr. 18).

The policy contained the following notice and co-operation clause:

“The Assured shall as a condition precedent to their right to be indemnified under this Certificate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may reasonably require and as may be in the Assured’s power. . . . ” (Provisos and Conditions No. 5 of Ex. 1, Tr. 18).

The original complaint filed in the state court action on November 12, 1964⁸ (Pre-trial order p. 5a, R. 59) plainly alleged fraud against Northwestern through its officers (Ex. A-20, Tr. 70, See par. III thereof) and alleged that Farwest “prior to and subsequent to the transaction involving plaintiffs’ land, the defendant, Pacific Farwest Mortgage and Escrow Co., has been acting in collusion with the defendant, Northwestern Utilities, Inc.,” (Ex. A-20, Tr. 70, par. IV).

It is not disputed that appellee was given proper notice of this claim and was forwarded a copy of the original complaint. (R. 255, Finding 23; R. 88, LL 11-12). It declined coverage of the claim because (1) collusion with the fraud of Northwestern brought it within the exclusion of par. 6 (b) i.e., “brought about or contributed to by the dishonesty of the as-

⁸Date of service is not shown.

sured or any of their employees.” and (2) that this was admittedly an intentional act as the result of a deliberate decision. (Ex. A-26, Tr. 63).

When the complaint was amended on February 3, 1965, wherein additional defendants were joined, the allegations were changed eliminating the allegation of collusion as against the defendant, Pacific Farwest. (Ex. 3, Tr. 19)⁹

More than five months prior to trial of the state court action the insurer's counsel was admittedly notified of this amendment — not by the insured, but by appellants' counsel. (R. 256, Finding 28).

The sole grounds mentioned in the district court's oral decision for denying appellants any relief was that the offending insured had neither given notice of this amended complaint nor had furnished it to his insurer after being requested to so do.¹⁰

To afford a quick-reference basis upon which to apply the legal principles hereinafter to be discussed, we set forth, largely chronologically, (because sequence is important), nineteen significant facts. We respectfully ask the court to keenly note that, as appellants seeking review, we set forth facts which are either (1) admitted (2) the sworn testimony of ap-

⁹The dates clearly show that the amendment was in no way prompted by Ex. A-26, the Feb. 15, 1965, letter declining coverage.

¹⁰The court's own questioning of the insurer's counsel, Mr. Moss, seemed to reflect his feeling that, despite counsel having read paragraph IV of the original complaint, and having been informed that collusion was no longer alleged in the amended complaint, the insurer's counsel (not having been furnished the amended complaint) would not know the basis upon which relief was asked unless told by Mr. Yates. Too, this was a post state-trial conversation of which the court's inquiry was directed. (Tr. 54-55).

pellees's counsel or (3) are factual contentions of appellee.

(1) December 1, 1964, the insured wrote its agent, Wood Insurance Agency, advising of a possible claim under the policy (Ex. 7 Adm. fact 5 of Pre-Tr. Order, R. 60, Finding 23, Tr. 255).

(2) December 5, 1964, insured's agent wrote to Voight-Walker Co., Inc.¹¹ as follows:

"We received the enclosed letter from Pacific Farwest Mortgage & Escrow Co., which states a possible claim under the above policy.

Please contact Mr. DeCrane Cooke of Pacific Farwest Mortgage & Escrow Co., for additional information." (Def's. Ans. to Interrog. No. 1, R. 39-40, Ex. 9, Finding 23, Tr. 255).

(3) December 7, 1964, the insured's attorney, Mr. Yates, wrote to Voight-Walker (Ex. A-21, Tr. 70), (enclosing the complaint and the insured's answer),¹² as follows:

"Enclosed you will find a photostatic copy of summons and complaint in the above case together with a copy of our Answer which was served and filed on behalf of Pacific Farwest Mortgage & Escrow Co., Inc.

As the pleadings indicate, Pacific Farwest Mortgage & Escrow Co., Inc., was acting as escrow and had in its possession a deed which was delivered it by the plaintiffs as sellers under a real estate contract. This deed was to be delivered

¹¹This company is admittedly Lloyd's Statutory Agent in the State of Washington. (Ex. 1, Tr. 18, Finding 23, Tr. 255, l. 24).

¹²The answer was not offered into evidence. We suggest that, upon analysis, it may be quite conclusively inferred that it denied any fraud on the part of the insured.

to Northwestern Utilities, Inc., as purchaser under the real estate contract, when the purchaser had performed the contract in conformity with its terms. Purchaser performed, in our opinion, in conformity with its terms but the seller didn't want the deed delivered. Suit is commenced by the seller because the deed was delivered."

(4) About a month later, on Jan. 6, 1965, Voight-Walker Co., forwarded copies of Yates' letter, the complaint and the answer prepared by Yates,¹³ to Mr. Moss, one of appellee's counsel. (Tr. 68, Finding 24, R. 255).

(5) Upon receipt of the above documents, appellee's counsel, Mr. Moss, telephoned insured's attorney, Mr. Yates. Concerning the conversation, Mr. Moss in part testified:

"I told him that I didn't think that this claim was covered under the policy, for two reasons: That the complaint clearly alleged fraud, which was concluded by the policy, and I thought this was an intentional act, decision, which was not covered under the policy, but that I would report to the underwriters and see what they wanted to do"¹⁴ (Tr. 59, ll. 1-7).

(6) On February 3, 1965, appellants filed an amended complaint which added additional defendants and wherein the allegation of collusion on the part of Pacific Farwest was eliminated. (Ex. 3, Tr. 19).

¹³It will be remembered that, under this policy, the insured cannot *demand* a defense by the carrier. (Provisos and Conditions 2, Ex. 1).

¹⁴The testimony of Mr. Yates was generally in accord (Tr. 82, 91-92) although he felt the intentional nature of the act was most emphasized. The general veracity of Yates was the subject of commendatory notice by the state court judge. (A-29, Tr. 209, p. 7, ll. 1-6, Judge Shorett's Oral Opinion in state court action.)

(7) A few days prior to February 15, 1965, the insurer's attorneys received instructions from the underwriters to deny coverage. (Tr. 35, ll. 21-24; Tr. 38, ll. 10-21).

(8) Following those instructions, Mr. Moss wrote to Mr. Yates on February 15, 1965 the following:

"On behalf of Errors & Omissions Underwriters of Pacific Farwest Mortgage & Escrow Co., Inc., we respond to your letter of December 7, 1964, to Voight-Walker & Co., Inc., giving notice of the captioned claim and enclosing copies of the pleadings. The complaint against Pacific Farwest Mortgage Co., charges that it acted in collusion with the defendant Northwestern Utilities, Inc., which is otherwise charged with fraud and deceit in the complaint, and to the extent that this charges Pacific Farwest with fraud, such an allegation is excluded by paragraph 6 (b) of the Errors & Omissions Certificate.

"The other allegation of the complaint charges Pacific Farwest with violating plaintiff's instruction in releasing the deed without permission; you have advised that this was an intentional decision by your client and in fact your client secured protection for itself by obtaining a \$1500. cash indemnity fund from the purchaser to indemnify your client from any liability that might be incurred by it from releasing the deed. Under the circumstances it is underwriters' conclusion that this claim is not insured by the Errors & Omissions Certificate and underwriters accordingly deny coverage without prejudice to any and all rights accruing to them under the terms of the applicable Errors & Omissions Certificate." (A-22, Tr. 60).

(9) About one month later Mr. Moss closed his file on this claim. (Tr. 39, 60)

Mr. Moss, being cross-examined by co-counsel, Mr. Zilly:

“Q. Mr. Moss, as I understand it, approximately thirty days after you wrote to Mr. Yates declining coverage, you closed your file; is that correct?”

A. Yes.”

(10) On May 20, 1965, Mr. McCormick, one of appellants’ counsel, (having been furnished a copy of the Feb. 15, 1965 letter declining coverage as an answer to his inquiry of Mr. Yates concerning Farwest’s insurance coverage (R. 256, Finding 28)) wrote directly to Mr. Moss as follows:

“Mr. Orvin H. Messegee and myself represent the plaintiff in the reference matter and we recently received a letter from Mr. Leslie M. Yates, attorney at law, who represents Pacific Farwest Mortgage & Escrow Co., Inc., which apparently has since ceased operations. Mr. Yates furnished us with a copy of your letter to him dated February 15, 1965, wherein you take the position that your client’s insurance policy does not cover the instant situation.

Since February 15, 1965,¹⁵ our investigation has led us to believe that your client’s insured was not acting in collusion with the defendant, Northwestern Utilities, Inc., and all parties have been served and there is on file an Amended Summons and Complaint reflecting this.

Mr. Messegee and I would be happy to meet with you and discuss the case, and would appreciate at this time your furnishing us a copy of the policy in question.

¹⁵This obviously should have been Jan. 15, 1965. It is admitted that the amended complaint dropping any reference to collusion was filed Feb. 3, 1965.

May we please hear from you at your convenience." (Ex. 5, Tr. 21).

There was at no time any response to this letter. (Pre-Tr. Ord. Adm. Fact 17, Tr. 42, 43, 61, Finding 28, R. 259).

(11) On May 24, 1965, Mr. Moss, insurer's counsel, wrote the following letter to Mr. Yates:

"We enclose copy of letter received from attorney McCormick. Please furnish us a copy of all relevant pleadings subsequent to the original complaint and answer, including particularly the amended complaint. Advise also the current status of Pacific Mortgage & Escrow Co., Inc., and whether you intend to continue to defend your client in this case.

We have never been provided with a copy of the earnest money receipt and agreement, the real estate contract, or the escrow instructions and would appreciate your furnishing us a copy of the same; if there were no written escrow instructions please advise.

Underwriters continue to reserve all rights under the applicable Errors & Omissions Certificate." (Ex. A-26, Tr. 63).

There was at no time any response to this letter and the documents therein mentioned were not furnished. (Finding 29, R. 256).

(12) No further effort of any kind was made by insurer's counsel to elicit further information from any source whatsoever until after trial of the state court action. (Tr. 48-54).

(13) During this five month period, no follow up was made to the May 24, 1965 formal letter of request

to insured's counsel. (Tr. 54).

(14) The invitation contained in the letter of appellants' counsel was never accepted nor had a copy of the May 24, 1965 letter (R. 61) been sent to Mr. McCormick (Ex. A-26, Tr. 63).

(16) During the year following entry of judgment in King County Cause No. 630691, appellee took no action to vacate or modify the judgment. (Finding 40, R. 259). (See RCW 4.72.010 et seq., Appendix C, P.).

(17) The request by Pacific Farwest's insurance agent that Mr. Cooke, president of the escrow company, be contacted for further information was not heeded. (Tr. 54).

(18) Mr. Yates was never offered to be paid any legal fees by appellee. (Pre-Tr. Ord., Adm. fact 13, R. 61, Finding 34, R. 259).

(19) On or about March 1, 1965, the insured, Pacific Farwest ceased doing business. (Defendant's Contention of Fact No. 8, R. 65, 1. 24), and appellee was aware of this (R. 44, ll. 1-4).

SPECIFICATIONS OF ERROR

I.

The court erred in entering judgment dismissing appellants' action.

II.

The court erred in entering its order of August 21, 1967, insofar as it denied appellants' Motion for Summary Judgment.

III.

The court erred in denying appellants' Motion for New Trial and Amendment of Findings

IV.

The court erred in making and entering the following factual findings:

1. That part of Finding of Fact 20 which reads:

“Pacific Farwest further knew and fully appreciated that there was a likelihood of being sued by plaintiffs if Pacific Farwest delivered the fulfillment deed in violation of the instructions received from plaintiffs' attorney not to release the deed, but Pacific Farwest nevertheless intentionally and wilfully delivered the deed from escrow. The delivery of the deed did not constitute a negligent act, error or omission.”

2. All of Finding of Fact 22.

3. Finding of Fact 25 for its failure to enumerate both reasons given by the insurer for declining coverage.

4. That part of Finding of Fact 30 reading:

“Under the foregoing provision of the insurance Certificate, defendant was entitled to be furnished with the pleadings, documents and information requested by defendants' counsel of Mr. Yates. The determination by Mr. Yates not to respond to counsel's letter of May 24, 1966, (Ex. A-26) or furnish the pleadings, documents as therein requested, was an intentional decision on the part of Mr. Yates.”

5. All of Finding of Fact number 31, except for the first sentence thereof.

6. All of Finding of Fact number 32.

7. All of Finding of Fact number 33.

8. All of Finding of Fact number 41.

V.

The court erred in making and entering its legal conclusions numbers 3 through 7.

ARGUMENT OF APPELLANTS

SUMMARY OF ARGUMENT TO FOLLOW

Specifications of Error I, II, and III and Specification of Error V, the latter including all of the court's Conclusions of Law, except numbers 1 and 2, together and in common, involve what appellant contends are basically erroneous concepts of present day insurance law and avoidance of prolixity invites a common discussion which will appear with separate organization under Section I to follow: (Specification of Error IV concerning claimed erroneous Finding of Fact, insofar as any part of such findings are really legal conclusions, (as we contend some are), will not warrant the repetition of the argument in Section 1, which will hopefully cover these issues).

Section I will be sub-sectioned as follows:

A. What are the applicable underlying concepts of Insurance Law?

B. What is the proper construction of "*negligent act, error or omission*" as used in a professional liability policy?

C. Are *intentional* acts excluded from coverage or not included in coverage?

D. What is the required construction of Par. 5 of "Provisos and Conditions"?

E. What are the *purposes* of *notice and cooperation*?

F. When may an insurer avoid liability based on its insured's *failure to cooperate or to give notice*?

G. May insurer *re-litigate* the issue of their insured's liability to appellants?

Section II. will confine itself to Specification of Error number IV insofar as the findings of which complaint is made are deemed to be true findings of fact.

Section III of argument to follow will concern itself with Specification of Errors numbers II and III (Denying Motions for Summary Judgment and New Trial) insofar as error may be based on procedural considerations.

Section IV will simply be the conclusion of argument.

SECTION I

A. What are the Applicable Underlying Concepts of Insurance Law?

Appellee's memorandum in resistance to appellant's Motion for New Trial in the lower court stated:

"This case has probably been the most thoroughly briefed law suit — on both sides — in which we have participated in our trial practice.

. . .¹⁶

This may well be true, but we are impelled to most respectfully and earnestly say that we have thus far

¹⁶The combined briefs of both counsel appear to exceed 130 pages.

sensed a good deal of unused endeavor — and, obviously, the appellants are most hopeful that their counsels' earlier tilling of the law together with a new climate may bring more fruitful results.

Risking the appearance of hyperbole, we must candidly state that we were startled when, after Findings and Conclusions had been signed, it was found that every pellet of appellee-insurer's shot gun blast had precisely found its mark. At the same time, the veteran trial judge cannot be faulted for his most conscientious attitude and his devotion to his judicial role. And we even concede that his decision, erroneous as it may to us appear, might well have been the correct decision in the right historical setting.

But yesteryear's concept of purely technical defenses, throughout the law, and particularly in the field of insurance, is fast eroding under a relentless attack by enlightened courts. "Make-believe" is out — as it should be.

Today's unmistakable trend is to politely discard all purpose-defeating and purely artificial refinements into "the limbo they so heartily deserve", and without damaging the genuine substance of contract law, to so administer the law in the field of insurance as to effectuate desirable social purposes.

The eyes of the law, in dealing with insurance disputes, no longer so intently focus on privity that its peripheral vision loses sight of the innocent third-party victim. Insurers increasingly are finding the business less private. The public has an interest. RCW 48.01.030 (See App. 3).

For our present purposes, what ground rules will

govern such an insurance-avoidance case in this appellate forum?

First and basically it is agreed, of course, that the Erie¹⁷ doctrine applies and the applicable substantive law of the State of Washington governs. Insofar as concerns the district court's denial of summary judgment, it is acknowledged that the sufficiency of the evidence to raise a fact issue "should not be controlled by state law:" *Allen v. Matson Navigation Co.*, (CA 9th 1958) 255 F. 2d 273.¹⁸ Absent any pronouncement of the law on a particular point, this court must use "its best judgment" of what the Washington court would hold. *Tavernier v. Weyerhaeuser Co.*, 309 F. 2d 87 (CA 9th 1962). "Prophetic judgment" may be necessary. *Cooper v. American Airlines*, 149 F. 2d, 355, (CA 2d, 1945).

Appellants are quite mindful of the presumptive correctness of the lower court's findings. At the same time considerable comfort is found in this court's review formula when substantially all of the legally determinative facts are documentary in form or are admitted facts.

"In determining this point (whether the findings were clearly erroneous) we consider all of the evidence, giving the written evidence the weight we deem it entitled to *de novo*, and applying the oral evidence with 'due . . . regard to the opportunity of the trial court to judge of the credibility of the witnesses.' " *Smyth v. Barne-*

¹⁷*Erie Railroad Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 Ld. ed. 1188.

¹⁸As explained by Prof. James Wm. Moore, this view is in constitutional obedience to Article III and the Seventh Amendment and the Erie doctrine becomes subservient. 5 Moore Fed. Practice, 2d Ed. Sec. 38.10 p. 102. At the same time, no different treatment between the forums would be expected.

son, (CA 9th 1950) 181 F. 2d 143, 144; *Kaufman-Brown Potato Co. v. Long*, (CA 9th 1950), 182 F. 2d 594, 597.

Judge Frank of the Second Circuit elaborately considers the meaning of the "clearly erroneous" qualification for review under FRCP Rule 52 (a) in *Orvis v. Higgins*, (CA 2d 1950) 180 F. 2d 537, 538.

In finding the crucial fact contrary to that found by the trial judge, the majority opinion adverts to the intent of the rule that jury verdicts or administrative findings are necessarily more immune from review than are a trial judge's findings of fact.¹⁹ and states that

"... here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant."

Specifically respecting contests between insurers and third-party beneficiaries of the insurance contract, it is recognized to be the law that the third party stands in the shoes of the insured. *Van Dyke v. White*, 55 Wn. 2d 601, 349 P. 2d 430.

Insurance contracts will be interpreted in a manner most conducive to affording coverage. All ambiguities will be resolved in favor of the insured. That this is clearly the law of Washington is well recognized by this court. It was quite deliberately determined to be so in *U.S., and others v. Eagle Star Ins. Co., Lm't.*, 196 F. 2d 317, wherein a rehearing was granted in 201

¹⁹This distinction was well established by the Supreme Court in *U.S. v. U. W. Gypsum Co.*, (1948), 333 U.S. 364, at 396, 68 S. Ct. 525, 92 L. ed. 746.

F. 2d 764 (1953).²⁰ The majority opinion stated at 765:

“The Washington Court adheres to the general rule that policies of insurance are construed in favor of the insured and most strongly against the insurance companies.” Citing *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 P. 113, 4 L.R.A., N.S., 636; *Green v. National Casualty Co.*, 87 Wash. 237, 151 P. 509, 511.

Decisions of the Washington Court in the fifteen years since, many of which are hereinafter cited in support of more specific points, amply support this court's determination that this state is in the “liberal” school.

B. What is the Proper Construction of “Negligent Act, Error, or Omission” as Used in a Professional Liability Policy?

Appellee has contended, thus far successfully, that this Lloyd's policy insures only against acts which involve *negligence* and that they must be of an accidental or inadvertent type; that if the insured intended to do the act which resulted in harm there can be no coverage. This overlooks the horn-book principle that negligent acts are intentional acts.

In its Findings of Fact, the court found that “... Pacific Farwest nevertheless intentionally and wilfully delivered the deed from escrow. The delivery of the deed did not constitute a ‘negligent act, error, or omission’”, and again, in its Conclusions of Law, concluded that such delivery “... was an intentional and

²⁰Although, upon rehearing, the 196 F.2d 317 decision was reversed, it will be noted that the earlier case reversed the trial court in part whereas 201 F.2d 764 reversed the trial court *in toto*.

wilful act and did not constitute a negligent act, error or omission' within the meaning of the coverage provisions of defendants' Certificate of Insurance." (See Finding 20, R. 254; Conclusion 6, R. 261.)

Of course, earlier, the state court, without any insurance question involved, had held to the contrary—but, because of the lack of notice found in the case, as explained in the district court's oral opinion (R. 239-242), neither the state court's findings nor judgment were held to be binding upon the insurer.

So, reserving the question of sufficiency of notice for present (Sub. sec. E. *supra*), what would the Washington Supreme Court have ruled in this same situation? We confidently venture that it would have had little difficulty in holding that, when an escrow agent who has available to him a fool proof alternative, succumbs to the pressure of one of the disputing parties to the escrow transaction and releases from his safekeeping any document as valuable as a deed, over which he is a fiduciary custodian, then his conduct, as a matter of law falls below that of a reasonably prudent escrow agent and is *negligent conduct*—and if harm results, he is liable. We are equally confident that the Washington Court would take the position, in construing the subject policy's coverage clause, that if his belief that he was right²¹ could be held to immunize himself from the charge of negligence, then he has still committed an *error*. The Washington Court, just as surely, would hold that when an escrow agent breaches his *contract* of escrow, he has committed error under a professional errors and omissions policy.

²¹It should be noted that appellee has consistently contended that Pacific Farwest had a legal right to release the deed.

In *Sutherland v. Fidelity and Casualty Co.*, 103 Wash. 583, 175 Pac. 187, an action on a medical malpractice policy, the insurer contended that, although the doctor-insured may not have removed all of his patient's gallstones as he agreed to do, there was no showing of malpractice, the Washington Court said,

“The words malpractice, error and mistake, as used in this indemnity policy, do not mean necessarily the same thing. If they were so intended, it was an idle thing to insert more than the word malpractice. A physician may err or make a mistake without being guilty of malpractice. This policy covers malpractice. It covers error, and it covers mistake in the practice of appellant's profession; and if liability flows from either, and he is required to pay damages on that account, we think it is plain that the policy here undertook to insure against such mistake or such error, as well as against malpractice. The words “liability imposed by law” clearly refer to a judgment recovered on account of malpractice, error or mistake, and do not limit the policy to cases where there was simply malpractice, where the physician is required to use care, diligence and such skill as is ordinarily possessed by the average members of the profession in good standing. The judgment in the Schuster case was a liability fixed by law. This liability resulted from an error or mistake of the appellant in his treatment of Mr. Schuster. The mere fact that appellant had a special contract to remove all of the gallstones from Mr. Schuster did not affect the insurance policy, because it was a contract made in the practice of appellant's profession and one which he clearly had a right to make.”*²²

²²Mr. Rowland H. Long, former vice-president and general counsel for the Massachusetts Mutual Life Insurance Co., in his treatise on “The Law of Liability Insurance”, in Vol. II at the end of Sec. 12.15 extends kudos to the Washington Court for its construction of the policy in the *Sutherland* case.

Applying the same interpretative concept to hold for the insurer, the Washington Court ruled that injury caused by collapse of a treatment table came within the exclusion of a general premises liability policy which excluded injury resulting from "any malpractice, error, negligence or mistake committed by any person in the performance or omission of professional services." *Harris vs. Fireman's Fund*, 42 Wn. 2d 655, 257 P2d 221. The subject contract of insurance must be presumed to have been entered into in the light of existing Washington decisional law. 17 Am. Jur. (2d) Contracts, Sec. 257, p. 654.

The above cases are simply obedient to the well known rule of construction that language will be considered to have been meaningfully used. As stated in 17 Am. Jur. (2d) Contracts, Sec. 259, p. 661:

"So far as reasonably possible, effect will be given to all the language, and to every word, expression, phrase and clause of the agreement. No word or clause should be rejected as mere surplusage if the Court can discover any reasonable purpose thereof which can be gathered from the whole instrument."

Moreover, where the expression "negligent act" has a definite legal meaning quite different from "error", the established legal meanings should attach. 17 Am. Jur. (2d) Sec. 249, p. 642. Even apart from legal usage, the words in ordinary usage have distinctive meanings. See *Burns v. American Casualty Co.*, 273 P2d 605 (Cal. 1954) and Webster's New Twentieth Century Dictionary, 2nd Ed.

In addition to the foregoing, even if the language were ambiguous, the Court would be obliged to interpret it in a manner most favorable to plaintiff—this,

even though the Court were to believe that Lloyd's intended the contrary. *Ames v. Baker*, 68 Wash. 2d 713, 415 P2d 74.

That Lloyd's may have in fact not intended to afford coverage for acts such as committed by Pacific Farwest in this case makes utterly no difference.

In *Sears Roebuck & Co. v. Hartford*, 50 Wn 2d 443, 313 P2d 347, we read:

"That Sears received a greater coverage than Rockey was obligated to furnish, and than Hartford intended to give, is not a matter with which we are here concerned. Since an insurance policy is merely a written contract between an insurer and the insured, courts cannot rule out of the contract any language which the parties thereto have put into it; cannot revise the contract under the theory of construing it; and neither abstract justice nor any rule of construction can create a contract for the parties which they did not make for themselves. *Jefferies v. General Cas. Co.* (1955), 46 Wn. (2d) 543, 283 P. (2d) 128; *Evans v. Metropolitan Life Ins. Co.* (1946), 26 Wn. (2d) 594, 174 P. (2d) 961

We have but recently, in a case involving much greater hardship on the insurance company, and under circumstances where the evidence debors the policy clearly demonstrated a specific intention not to cover the risk in question, held that the insurance company was bound by the terms of the policy it had issued. *National Indemnity Co. v. Smith-Gandy, Inc.*, (1957), ante p. 124, 309 P. (2d) 742, See, also, Laws of 1947, chapter 79, Sec. 18.19, p. 366 (cf. RCW 48.18.190)." p. 449.

Courts quite rightly at times ask: "What does this policy insure against?" And so here, what risks were

being assumed by Lloyds when it accepted hundreds of dollars as a premium?—that someone might upset an ink - bottle and obliterate a signature?—that a window might negligently be left open so that a deed might blow away? The escrow company's premises policy would cover risks of tripping over telephone cords, or falling from collapsing chairs. The instant policy *limited* the coverage to negligent acts, or errors, or omissions which would be *peculiar* to the escrow business. Again the actual words are,"...*only in their professional capacity as ESCROW AGENTS.*" (Ex. 1, App. B.)

If one were to ask the average person, "Why would an escrow agent want a \$100,000.00 errors and omissions liability policy?" he would likely reply with the obvious answer, "I suppose he would want it in case he released someone's deed or paid out someone's money and it turned out that he shouldn't have."²³

The Washington Court, as do most, strives to *find*—not defeat—coverage. Indeed, it has placed quite *different* constructions on *identical* language dependent upon whether by so doing coverage would be afforded or denied.

This is commented upon in a law review discussion of *Brown v. Underwriters at Lloyds*, 53 Wn 2d 142, 332 P2d 228 (1958), wherein our court found coverage for a loss resulting from the previously proved misrepresentation of a real estate broker. Of course, there, the court was considering the word "fraudulent" as

²³Of course he might also want such coverage for other risks, . . . and also as an advertisable assurance to the public. It will be noted at the bottom of Ex. 8, (Tr. 29), the insured's stationery bore the words "Bonded and Insured".

used in an exclusionary clause, the broker having falsely represented something believed by him to be true. The trial judge's holding, that the loss was excluded from coverage, was reversed.

"Courts generally seem inclined to apply a construction which will favor recovery by an insured, rejecting strict literal readings which most frequently would favor the interests of the insurance company that drafted the policy. To apply such a broad meaning to the same words in an errors and omissions policy (fraud) would defeat the underlying purpose of favoring the insured; so the court in the present case preferred to alter the result so as to preserve this purpose. This is the anomalous result of a broad meaning to the word "fraud" in a fidelity bond case and a narrow meaning when the same word is used in an errors and omissions policy." (34 WLR 245, 247).

In the case at bar, the trial judge apparently accepted appellee's contention below that "negligent acts, errors, or omissions" as used in this policy mean "negligent acts, negligent errors and negligent omissions."

We earnestly urge before this court that such a construction cannot be accepted without the violation of numerous rules of contract construction. Socratically testing the soundness of this view, why did not the scrivener *use* the words "negligent acts, negligent errors, and negligent omissions"? Too many words? Then, why not the single word "negligence"? The word "negligent" as used in the law's symbol, "negligent acts", is not a simple attributive adjective in an ordinary syntactical group but is an attributive adjective as a component of a *group word*. The expression "negligent act" denotes an act which is defined

by the several applicable principles of the law of torts. It is quite different from "error".

It is almost too obvious to warrant the attendant prolixity to say that, although when one acts negligently, in a broad sense, he may have erred, the converse is certainly not true. One may believe he is entirely justified in what he does, that he is absolutely right, and he may act most conscientiously, most painstakingly and most precisely, and still err—a fact of which, indeed, we earnestly feel the lower court's decision herein affords good illustration.

Appellee, who appeared to have been given a carte blanc by the trial judge in its preparation of proposed findings and conclusions, seemed to have abandoned its earlier position that loss resulting from breach of contract²⁴ was not covered. Nonetheless, appellants' present stature in this long litigation dictates certain argument for precautionary purposes. For this reason we cite, not only *Sutherland*²⁵, ante, but, also, *O'Toole v. Empire Motors*, 181 Wash. 130, 42 P. 2d 10, wherein a garage-keeper's liability policy expressly excepted from coverage any liability "under any agreement or contract, oral or written". The essential pleadings are set out on p. 132 of the decision. They allege an agreement of the defendant garage to do certain repairs, that he purportedly did the repairs, that after receiving the car back, the plaintiffs were driving near Lake Crescent when the right front tire blew out, causing the injury. "That the right front wheel, despite defendant's agreement

²⁴For a comprehensive discussion bearing upon whether appellant's action sounded in tort or contract, we invite the court's attention to *Compton v. Evans*, 200 Wash. 125, 93 P.2d 341.

²⁵*Sutherland v. Fidelity and Casualty Co.*, 103 Wash. 583, 175 Pac. 187.

to so do, had never been aligned, but was badly out of alignment . . . ” causing the tire to wear thin, etc.

When issues were joined on the garnishment proceeding against the defendant garage's carrier, the two-fold defense was (1), not within the coverage because the damage resulted from a breach of contract, and (2), collusion in obtaining the original judgment. The court, as to point (1) said, *inter alia*,

“The complaint alleged negligence, either in repairing the car as agreed between the parties, or in failing to repair entirely. That was negligence in itself and the cause of the damage.” p. 136.

Interestingly, nowhere in the pleadings is the word “negligence” used.

As to point (2), more pertinent to argument to follow, the court stated:

“Appellant had the opportunity of remaining in the defense of the principal action and preventing any collusion if such were possible, which it failed to do. That being true, it cannot be heard later to question that judgment.”

In *Aitchison v. Founders Ins. Co.*, 333 P2d 178, (1958, Cal.) an insurance policy rider provided:

“(T)his policy, as respects Coverage C, . . . is amended to indemnify the insured against any claim or claims arising out of the assured's occupation as a buyer or seller of metal ores . . . which may be made against the insured *by reason of any negligent acts, errors or omissions* committed by the insured and/or employees of insured in the conduct of insured's business as stated . . . ” (Emphasis ours)

Plaintiff-insured, Aitchison, sold to the General Services Administration some \$20,000.00 worth of ores, he being required to certify to the agency upon sale that the ores were of domestic origin. These happened to be foreign ores that had been smuggled into the United States, wherefor they were seized and declared forfeit as smuggled property. Aitchison was relieved of the forfeiture upon paying about \$6,900.00 in duties and costs. The G.S.A. demanded return of all money paid because illegally paid. In Aitchison's action to have his rights against the insurer under the policy declared, the court, after pointing out that "the trial court could not and we *cannot add* to the language of the rider *or omit* any of the language used in the rider in determining its meaning," (citing cases), stated at p. 182:

"Applying the language of the rider to the claim of the Administration, we are convinced that the trial court correctly declared that this claim was within the coverage of the rider. The Administration's claim arose out of the error of Aitchison in selling to the Administration as tungsten of domestic origin that which was in fact foreign. Founders has not in its brief asserted that the word "error", as used in the rider is modified by the word "negligent". We must assume that Founders in writing the policy intended the word to have its ordinary meaning and that it used it to cover a hazard which was not due to a negligent act or omission. Civ. Code, Sec. 1644; *Continental Cas. Co. v. Phoenix Construction Co.*, supra, 46 Cal. 2d 423, 438, 296 P. 2d 801. In Webster's International Dictionary, second edition, the word "error" is defined as follows: "Belief in what is untrue***" and "mistake" is there given as a synonym of "error". It is undisputed here that when Aitchison sold the smuggled tungsten to the Administration he honestly

but mistakenly believed it to be domestic tungsten and had he not made this error there could have been no claim on the part of the Administration. As the transaction was in the business of Aitchison and as the claim has as its foundation his error, it clearly falls within the coverage of the policy."

C. Are Intentional Acts Excluded From Coverage?

If the trial court had correctly applied Washington law, he would not have either *found* or *concluded* that, because Pacific Farwest *intentionally* released the deed, its act in so doing was not covered. The court would have simply looked at the exclusions and plainly seen that *intentional acts are not excluded*.

The Washington court said in *Hering v. St. Paul-Mercury Indemnity Co.*, 50 Wash. 2d 321 p. 324, 311 P.2d 673 (1957),

"The contention of the appellant is that, inasmuch as its duty to defend is to be determined by the allegations of the complaint, it had no duty to defend this action for the reason that the complaint alleged an assault, which constitutes a criminal offense, and that public policy would be violated were it to insure against wilful criminal misconduct.

The cases from other jurisdictions, cited by appellant, are cases in which the insurer insured against "accidents", and these courts held that assault is not within the definition of accident.

The policy in the instant case is not an accident policy."

The most devastating answer to the argument that was accepted by the trial court is that, if intentional acts were intended not to be included in coverage,

they *would have been excluded*. Particularly should this be presumed when such exclusionary clauses are so very common. Moreover, even if there had been such an express exclusion no comfort would have been afforded appellee because it has insisted throughout that Pacific Farwest had a *legal right* to release the deed. To come within an "intentional act" exclusion in a liability policy, it is the resulting *harm* which must be intended—not the act alone. Appellee argued throughout the lower court proceedings that the policy did not cover because insured did an *intentional, deliberate, business-decision* type act. But at no time has appellee contended that the harm that resulted from the act was *intentional*. At least, to make an intentional error, or do an intentional wrong, must not the actor *know* he is committing an error or doing wrong?

Defendant's Contentions of Law number 2, of Pretrial Order (R. 68) stated that "... Pacific Farwest, as escrow agent, was, therefore, legally entitled to deliver the fulfillment deed to the buyer ..." (lines 4-5) and "Pacific Farwest was not a party to the fraud of Northwestern Utilities on plaintiff ..." (p. 13, lines 6-7 of Pretrial Order (R. 68)). The Superior Court of King County *has found* that Pacific Farwest *did wrong*. Is not appellee bound to agree that, *if it did wrong*, it was not *intentional wrongdoing*—as the State court likewise held?

See Annotation in 2 A.L.R. 3rd 1238. "Liability Insurance: Specific Exclusion of Liability for Injury Intentionally Caused by Insured."

Also see 29A Am. Jur. Insurance, Sec. 1340.

In *Russfield Corporation vs. Underwriters at Lloyd's*, 164 Cal. App. 2d 83, 330 P2d 432, we read:

“A ‘wilful act’ within a statute providing that the insurer is not liable for loss caused by the wilful act of the insured connotes something more blameworthy than the sort of misconduct involved in ordinary negligence and something more than the mere doing of or *intentional doing* of an act constituting negligence.”

The last case cited involved a “statutory” exclusion clause.

When contractual exclusionary clauses relating to *intentional acts* are relied upon as a defense, the courts *require the insurer to sustain the burden of proving*, not that the *act* causing the damage was intentional, but that the *damage* itself was *intended*. See p. 18 of pocket part supplement to 20A Am. Jur. Insurance, Sec. 1346.

Consequently, even if the policy at bar contained a specific clause excluding from coverage harm resulting from *intentional acts*, (which exclusion is conspicuously absent), this court’s disposition of appellee’s contention, as accepted by the trial judge, might appropriately simulate the treatment given to “Continental’s Contention No. 2” by Judge East in the case of *Runyan vs. Continental Casualty Co.*, 233 F. Supp. 214 at p. 218 (Ore., 1964).

Appellee, obviously thus far successfully, has insisted that, not only is a covered act required to be negligent, but that it must be *inadvertent* or *accidental* in nature. (p. 17 Def. Br., R. 101). Of course, again, *it would have been simple to have so drafted the policy.*

We respectfully submit that, in the field of professional liability policies, often the risks which most demand coverage, from the *insured's* standpoint, are those that arise from the doing of *intentional* acts. The architect who intentionally and deliberately designs a building using components of certain strength believing that the structure will be safe (and let's have him consult with competent structural engineers in advance for good measure) may nonetheless be liable for his error if it turns out that the components were deficient.

The fact that an accountant may *intentionally and deliberately* advise his client to make certain stock transfers so as to derive a tax benefit, should not be a basis for avoiding coverage of losses resulting from such misadvice. *Bancroft v. Indemnity Co. of North America*, 203 F. Supp. 49 (W.D. La. 1962).

In the last cited case the court held that the words "neglect, error or omission" are very *broad* in professional liability policies.

For other helpful cases concerning the construction of professional liability policies, see the following:

Continental Casualty Co. v. Reinhardt, 247 F. Supp. 173 (D.C. Ore. 1965; *aff'd* 358 F2d 306, 1966)

National Surety Corp. v. Musgrave, 310 F2d 256 (CA 5, 1962)

H. L. Sogerty v. Gen. Acc. Fire and Life Assurance Corp. 48 Ca. Rptr. 37 (1965)

Cadwalader v. New Amsterdam Casualty Co., 152 A2d 484 (Pa. 1959)

Runyan v. Continental Casualty Co. 233 F Supp. 214 (Ore. 1964)

Thoresen v. Roth, 351 F2d 573 (Ca. 7, 1965)

Ottelman v. Interstate Fire and Casualty Co., 111 N.W. 2d 97 (Neb. 1961)

Scott v. Potomac Ins. Co., 341 P2d 1083 (Ore. 1959)

Maier v. U.S. Fidelity and Guaranty Co., 298 P2d 391 (Colo. 1956)

Concluding this section of our argument we cite the following three cases which show that even liability for damages resulting from assault and battery are covered by a medical malpractice policy.

Physicians' and Dentists' Business Bureau v. Dray, 8 Wn. 2d 38, 111 P.2d 568;

Sommer v. New Amsterdam Casualty Co., 171 F. Supp. 84 (DC MO. ED)

Shaw v. U.S.F. and G. Co. (CA 3rd N.D. 1938) 101 F 2d 92.

D. What Is the Proper Construction of Paragraph 5 of "Provisos and Conditions"?

The first sentence of "Provisos and Conditions", paragraph 5 reads:

"The Assured shall as a condition precedent to their right to be indemnified under this Certificate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may *reasonably require* and as may be in the Assured's power." (Emphasis ours).

The lower court's Conclusion 5, (R. 261), states:

"The assured, Pacific Farwest Mortgage & Escrow Company, breached the provisions of Condition No. 5 of defendant's insurance Certificate in

failing to furnish the amended complaint to defendant's counsel after being requested to do so, and in failing to furnish the documents and other information requested by defendant's counsel. Compliance with the provisions of Condition No. 5 of defendant's Certificate of Insurance is an express condition precedent to the right of the assured to be indemnified under the Certificate; and the breach of Condition No. 5 on the part of the assured, Pacific Farwest, precludes any liability of defendant to either Pacific Farwest or to plaintiffs who stand in the shoes of Pacific Farwest Mortgage & Escrow Company."

The above first quoted policy provision concerns two distinct and substantively quite distinguishable areas in the broad field of insurance policy conditions; the first, *notice of claim*, and the second, *cooperation*. Are both made express conditions precedent in this policy? The answer may or may not be important dependent upon this court's answer to questions which follow. An express condition precedent obviates the necessity of a showing that a breach was prejudicial. *Sears Roebuck & Co. v. Hartford Accident and Indemnity Company*, 50 Wn 2d, 443, 313 P. (2d) 347.

The above paragraph speaks of a condition precedent i.e. in the *singular*, that condition precedent being "to give immediate notice in writing of any claim" (appellee cannot dispute that *this was done*—unless it should strangely contend that the *amended complaint* gave rise to a new and different *claim*²⁶), and then, separated by the word "further"—not "as a further condition precedent"—but "further" being

²⁶Such a contention, if made, would be remarkably incongruous with the common practice of regarding an insurance claim as a factual report of the incident and would be utterly offensive to the modern notice pleading concept, i.e. that altering a cause of action does not change the underlying claim. (See FRCP Rule 15 (c) Relation Back of Amendments).

used disjunctively, *the* condition precedent having already been stated, we find that, additionally to the condition precedent, and further, and beyond that, the assured, *if requested*, shall give such information as may be in the assured's power and may *reasonably* be required.

If *both* of the acts described in this paragraph were intended to be conditions precedent, should not the first few words have commenced, "The Assured shall as *conditions* precedent to their right, etc"? In short, appellee's convenient interpretation, again accepted by the trial judge²⁷, is not sound when one applies the usual rules of language construction—much less when there is superimposed upon those rules the favoritism which established law requires be accorded to the assured.

In short, we note mention of a single condition precedent, and there then follows *two* conditions, different in substance, and the grammatical arrangement lends itself to simple and convenient disjunction.

We earnestly contend that the very most favorable view of the second clause in this sentence, from appellee's standpoint, is that it is ambiguous as to whether or not it, likewise, was intended to be a condition precedent. Unfortunately, from appellee's standpoint, that ambiguity must be resolved in favor of plaintiffs.

Deer Trail Mining Co. v. Maryland Casualty Co., 36 Wash. 46, 51, 78 Pac. 135, 136 illustrates the simple manner in which plural conditions precedent may

²⁷It will be noted that the Conclusions of Law refer to "Condition No. 5" *in toto* as being an express condition precedent.

be drafted. Actually, all that is required is an "s".

E. What Are the Purposes of Notice and Cooperation Clauses And F. When May an Insurer Avoid Liability Based upon Breaches Thereof?

Of course, no judgment should be binding upon one when it results from litigation of which that one has not had notice. At the same time, when an insurer either assumes a contractual *duty* to defend its insured, or reserves to itself the *right* to take over the defense²⁸, then, when it fails, or chooses not to participate, it becomes bound by the findings and judgment in that action providing it was sufficiently notified of its pendency and providing that the essential findings bring the loss within the coverage.

The district court, in its finding number 27, (R. 256) found that the insured did not give notice of the amended complaint, but by its finding 29, (R. 256) found that counsel for appellants *did* advise the insurer that an amended complaint *had been filed* and that "the charge of collusion" had been withdrawn. In its conclusion number 3, (R. 260), it held the insurer not bound by the King County judgment "because defendant was not given *proper* notice of the amended complaint", "was not *requested* to defend the amended complaint" and was not "*furnished*" the amended complaint upon request.

We urge the court to keenly note that this policy contains no "suit papers forwarding" clause. The conditions, whether both precedent or not, are only

²⁸As contended by appellee, "although defendant's policy does not contain an obligation to defend Pacific Farwest (but gives Underwriters the right to defend) as do many casualty policies, the principles are the same so far as the issue of res judicata is concerned." (Def. Tr. Br. p. 2, lines 23-26, R. 88). Appellants generally agree except for discerning a logical basis for a different test as to what may be *demand*ed before the insurer has elected to avail itself of its right.

two. (1) Notice of claim and (2) "The assured—shall give to Underwriters such *information* as Underwriters may *reasonably require* and *as may be in the Assured's power*."

Underwriters have never disputed that they had notice of the claim. "Defendant was given notice and the opportunity to defend the original complaint." (Def. Tr. Br. p. 2, lines 11-12, R. 88).

Appellee, of course, has contended throughout that it was not in any way affected by this notice because the claim alleged was obviously not within the coverage of the policy. (How obvious will be noted later.)

Appellee's contention that in order for the earlier judgment to be *res judicata*, the notice of the amended complaint was required to come from the insured and such document be delivered into its hands simply is not borne out by the weight of authority.

Still bearing in mind that this policy is absent any *condition* that suit papers must be forwarded, (the frequency of use of such clauses making such absence conspicuous), we refer the court to the annotation in 18 ALR 2d 443 (supplementing earlier treatment in 76 ALR 37 and 123 ALR 953) "Liability Insurance—Clause with respect to notice of accident or claim, etc. or with respect to forwarding suit papers," Sec. 9 thereof, 458, entitled "By or through whom given."

"The later cases support the general rule that the giving of notice of an accident or claim or the forwarding of suit papers need not be done by the insured himself but may, under certain circumstances, be attended to by other persons."

We dare say that the invitational tone of Mr. Mc-

Cormick's letter (Ex. 5) deterred the insurer from asking him for a copy of the amended complaint for fear he would promptly furnish it.

In *Lee v. Traveler's Insurance Co.*, 184 A 2d 636 (D.C. 1962) a garnishment action against the carrier to collect a judgment where the original action was not defended, and a *default* taken, the Court says at p. 637:

"Nicholson and Herian were served by leaving copies of the summons and complaint at their usual place of abode on March 29. On May 18 appellant's (Lee, the injured party's counsel notified the insurer by telephone that suit had been filed and process had been served. The insurer replied that it had received no notice from Nicholson or Herian that they had been served with process and had not been requested by them to defend the action, and that under the circumstances it did not believe it had either the duty or the right to enter the case and therefore it did not intend to defend. Counsel for appellant offered to send to the insurer a copy of the suit papers, but his offer was refused. On the following day appellant's counsel sent a letter to the insurer notifying it that he intended to have a default entered. Ten days later default was entered. After ex parte proof verdict and judgment were entered for appellant. The garnishment proceedings followed.

"The trial court ruled in favor of the insurance company on the ground that "the failure on the part of the insureds to forward the suit papers was a breach of a condition precedent and, as such, avoided any liability on the part of the garnishee under the policy of insurance." Our question is whether the trial court was correct in so ruling. We do not understand that the question of delay in reporting the accident is before

us. Although the report was accepted with a reservation, the insurer agreed to remove the reservation if the delay was not prejudicial to it, and it has made no attempt to show that it was so prejudiced. The question then is whether the insurer was relieved from liability to appellant because of the insured's failure to forward the suit papers to the insurer or otherwise communicate with it after service of process.

"The pertinent policy provisions read as follows:

'4. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.'

'27. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.*****'

"(1, 2) It is generally held that provisions relating to notice are of the essence of the insurance contract, and that, at least where the policy expressly makes compliance with its terms a con-

dition precedent to liability on the part of the insurer, failure to comply with the notice provision will release the insurer of liability on the policy. Annot., 18 A.L.R. 2d 443, 452. The cases so holding go no further than to say that the insurer must be given notice before it can be held liable. In the present case, while it is undisputed that the insured failed to forward the suit papers to the insurer, it is also undisputed that the insurer received notice of the accident, made an investigation and carried on settlement negotiations which were broken off when an agreement could not be reached. The reasonable inference is that the insurer was well aware of the facts and legal issues involved and of the probability that suit would be filed.

“When suit was filed and the insured failed to forward the suit papers, default was not taken without notice to the insurer. Appellant’s counsel notified the insurer of the pending action and offered to furnish the insurer with copies of the suit papers; when this offer was refused appellant’s counsel notified the insurer of the intention to take a default but at the same time offered to agree to extension of time the insurer required for filing an answer. It is clear the insurer had notice of the filing of the suit and was afforded full opportunity to defend. It refused, taking the stand that it was not required to defend because of the failure of the insured to forward the suit papers.

“The insurer would have us make a distinction between the policy provisions relating to notice of the accident and the forwarding of suit papers. Conceding arguendo that it may be of no importance whether notice of the accident or claim comes from the insured or from some other party, such as the person injured, the insurer argues that a stricter rule must be followed with respect to delivery of suit papers, that the insurer must receive

the suit papers from the insured upon whom they are served and from no one else. We are unwilling to make such distinction. The two requirements have essentially the same purpose, i.e., notice to the insurer. Notice of the accident enables the insurer to make prompt investigation and prepare to defend any action that may be brought. Forwarding the suit papers gives the insurer notice that an action has been brought and enables it to properly defend."

In *Northwestern Mutual Insurance Co. v. Independence Mutual Insurance Co.*, 319 S. W. 2d 898 (Mo. 1959) wherein, as subrogee, the plaintiff carrier stood in the shoes of the insured, the question arose as to whether Northwestern's attorney's forwarding of suit papers satisfied the express condition precedent requiring the assured to immediately forward suit papers. The Missouri Court of Appeals, after stating the general law in respect to performance by an insured of conditions precedent, says:

"Exceptions are recognized when the condition precedent is complied with by the 'real party in interest', even though he be another than the insured. So, a compliance by the injured person, who is the unnamed beneficiary of a liability policy, with a condition requiring the insured to forward suit papers to the insurer will enable the beneficiary to enforce the policy, notwithstanding the failure of the insured to act. *Blashfield*, *Cyclopedia of Automobile Law and Practice*, Vol. 6, Sec 4033; 29 Am. Jur. 818, Sec. 1090; 45 C.J.S. Insurance, Sec. 1051, p. 1276; 76 A.L.R. 38; 123 A.L.R. 954; *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S. Ct. 510, 85 L. Ed. 826; *Royal Indemnity Co. v. Morris*, 9 Cir., 37 F 2d 90; *Metropolitan Cas. Ins. Co. of New York v. Colthurst*, 9 Cir., 36 F 2d 559; *Slavens v. Standard Accident Insurance Co. of Detroit, Mich.*, 9

Cir. 27 F. 2d 859; *Bachman v. Independence Indemnity Co.*, 112 Cal. App. 465, 297 P. 110, 298 P. 57; *Hartford Accident and Indemnity Co. v. Randall*, 125 Ohio St. 581, 183 N.E. 433; *Morris v. Bender*, 317 Pa. 533, 177 A. 776; *McClellan v. Madonti*, 313 Pa. 515, 169 A. 760; *Butler v. Eureka Security Fire & Marine Ins. Co.*, 21 Tenn. App. 97, 105 S.W. 2d 523; *Jameson v. Farmers Mutual Automobile Ins. Co.*, 181 Kan 120, 309 P. 2d 394; *Simmons v. Iowa Mut. Cas. Co.*, 3 Ill. 2d 318, 121 N.E. 2d 509; Appleman, Insurance Law and Practice, Vol. 8, Sec. 4738, 4740. McKinnon was a beneficiary of the liability policy and a real party in interest, and so is his subrogee, so that compliance by Northwestern's attorney with the condition precedent of the policy requiring that the suit papers be forwarded immediately to the insurer would be sufficient to entitle it to maintain this proceeding, regardless of the failure of insured to comply with the condition."

The liberality of the Washington Court is illustrated by *Dowell v. United Pac. Casualty Co.*, 191 Wash. 666, 72 P.2d 296 where *oral* notice to an insurance agent satisfied the policy condition of "written notice."

In the case at bar, the district judge appeared to treat as of *no significance* whatsoever, the fact that Ex 5 *notified* the insurer of an amended complaint, *as well as its import*, more than five months *prior to trial* of the state court action and almost *nine months* before any judgment was entered.

Quite remarkably, and those words are used with thoughtful and respectful hesitance, the trial judge stated in his decision from the bench.

"This court is unable to distinguish the facts in this case from those involved in the case of *Suss-*

man v. American Surety Company, 345 F. 2d 679 . . . ”

In the cited case, Rachel Sussman sued Mario Algiers, Inc. a beauty salon, alleging injury sustained by her while she was receiving a shampoo when a washbasin lid fell on her head.

The policy contained this coverage exclusion:

“It is agreed that . . . the policy does not apply to injury, sickness, disease or destruction due to the rendering of or failure to render any . . . *cosmetic services or treatment.*”

Attorneys for American Surety nonetheless *did* appear and, after investigating the claim, they concluded that under the exclusion American Surety had no duty to defend. They *moved for leave to withdraw as defense counsel* for Mario and their motion was granted.

Ten days later, without any notice to the company or its attorneys, an amended complaint was filed wherein it was alleged that defective equipment and improper maintenance caused plaintiff's injuries. Mario failed to answer and Mrs. Sussman took a \$17,000.00. judgment by default. In the cited case, collection of the default judgment from the carrier was attempted.

We most respectfully insist that the Sussman facts are glaringly distinguishable because the *very fact* which was determinative of Sussman is absent here, i.e. that, in Sussman, the insurer's attorneys were utterly *without* notice and *without* knowledge of the amended complaint whereas in the instant case the insurer's attorneys *clearly had notice and had knowl-*

edge. In Sussman there was a “behind-the-back” default judgment 10 days after the amendment—which certainly was compatible with collusion. In appellant’s case, judgment was entered almost nine months after the amendment and after a hard fought “tooth and claw,” extended trial, appellant’s counsel having even invited the carrier to discuss the matter at the time notice of the amendment was given.

In the cited case, Judge Wisdom’s decision concludes, page 680,

“It is uncontroverted that American Surety had *no knowledge* of the amended complaint and of the proceedings until after the default judgment was rendered.

“Since American Surety was *neither notified of the amended complaint nor given any opportunity to participate in the defense* it cannot be required to pay Sussman in the amount of the State Court judgment against Mario.” (Emphasis ours.) *Sussman v. American Surety*, 345 F. 2d 679 (CA 5, 1965).

In its oral decision,²⁹ in addition to the authority of Sussman, the lower court also found to be “in harmony” the Washington case of *Lawrence vs. Northwest Casualty Co.*, 50 W. 2d 282, 311 P. 2d 670. The facts of that case simply do not fit the case at bar and we do not have the slightest quarrel with it because, upon disquisitive analysis, it *supports* our position. It

²⁹Of course, under the Findings and Conclusions signed by the Court herein, everything it discussed in its oral opinion became unnecessary and meaningless because, irrespective of however proper had been the notice of and the forwarding of the amended complaint by the insured, the allegations of the amended complaint did not come within the coverage of the policy anyway. This is so, of course, because the court held that “intentional” acts, although nowhere in the policy excluded, are not “negligent acts, errors or omissions”.

was *conceded* therein that the insurer *was responsible* for attorney's fees and the costs of the defense *after* the amended complaint was filed, despite the fact that nowhere, either in the written decision, or in the appellate briefs, is it shown whether notice of the amended complaint was even given.

Concerning Sussman, it is interesting to note that the Fifth Circuit was applying the law of Florida— and, for that matter, could have been applying the law of *any* state and would have been compelled to reach the same result. When the same circuit later considered Florida law on different facts it is shown that the liberality, which modernly favors the insured, exists in Florida as elsewhere. *Glenn Falls Ins. Co. v. Gray*, 386 F. 2d 520 (CA 5th, Fla. 1967).

Cooperation clauses are for the purpose of (1) preventing collusion and (2) for enabling an insurer to properly defend an action — *after it has undertaken the defense*. 8 Appleman, Insurance Law and Practice (1942 Ed., p. 99).

See, 70 A.L.R. 2d, 1197, "Liability Insurance-Cooperation."

We respectfully invite the court's attention to the June 1966 article by Paul Pretzel entitled "What Price Cooperation?" which appears in 521 Insurance Law Journal 325.

This court indicated the second purpose of a co-operation clause when it stated, in *Indemnity Insurance Company v. Forrest*, 44 F. 2d, 465 (CA 9th, Cal., 1930), that although the insured had breached the cooperation clause in the policy, still the insurer, having refused to defend the insured, was "now in no posi-

tion to claim that he failed to cooperate or assist in a defense that was never made.”

Which brings us to our next section of argument

F. When May an Insurer Avoid Liability Based on Its Insured's Failure to Cooperate or to Give Notice?

Before discussing the several circumstances under which an insurer will be held to have waived its right to insist upon strict performance of policy conditions, let us again note the pattern of the factual background. Here, the insurer made absolutely clear to the insured that “intentional acts” were not covered from the moment of the first conversation that took place between the insured’s and the insurer’s respective counsel on January 6, 1965.

True, the allegation of collusion was also stated as a reason, but whether collusion had or had not been alleged, the allegations of the complaint made it clear that insured had intentionally released the deed despite requests not to so do.

This being so, insured’s counsel could be expected by the insurer, to certainly consider that its earlier denial of coverage in no way would be affected by a subsequent deletion of any allegation of collusion where the operative facts remained unchanged. The insurer had a month to consider these suit papers before that conversation. Mr. Yates had every right to regard this as a *considered* opinion. Again, more than another five weeks later, the same determination to deny coverage for the identical two reasons was put in writing. Mr. Yates did not respond. Why should he have (although by this time the collusion allegation had been deleted) — when the other reason given still

remained? As Yates testified,

“and I knew those pleadings didn’t change the complexion as far as it related to the intentional act, and they would still have the same position.”
(Tr. 85, ll. 14-17).

Let us review the tests applied by the courts when determining the validity and efficacy of the insurer’s reliance upon breach by the insured of such conditions.

First, does the particular condition under scrutiny meet the test of an express condition precedent? If it does, then the breach need not be shown to have been prejudicial. If the particular condition fails the test, then no prejudice need be shown.

Second, whether condition precedent or not, was there in fact a breach of this specific condition? And, if so, was it material?

Third, if a breach in fact occurred, did the insurer make diligent efforts to avoid its occurrence?

Fourth, did the insurer waive the performance of the condition by its denial of liability on some other ground that was subsequently adjudicated to have been untenable?

The stage upon which these tests are conducted has as its floor a continuing favoritism of the insured in both interpretation and burden. The tests are conducted by the courts who first candidly announce that they will conduct these tests fairly but in the light of a firmly established procedure which requires them to resolve any doubt in the favor of the policy’s “purchased” purpose of affording coverage.

What of the case at bar?

The tests above enumerated have been gleaned from the decisions of many courts. To start citing cases at this point for those general propositions of law would only pose when to stop. Those hereinafter cited in support of the specific concepts will incidentally furnish ample authority.

(1) Whether the second clause of the first sentence of Provisos and Conditions number 5 of the policy is an express condition precedent has heretofore been considered.

(2) Was there a breach of either the requirement of notice of claim or *giving information* upon request Appellee concedes notice and service of the original complaint. It insists it may avoid liability on the judgment because, applying the same test that would be applied if there were a *duty* to defend, it would not have been required to defend the original complaint because of the "collusion" allegation. Even this basic position is subject to question. The original complaint's allegation, which is sought to bring it within the exclusion of 6(b) of the policy, i.e., "dishonesty," reads (albeit, perhaps from the draftsman's error), as follows:

"That, in fact, *prior to and subsequent to the transaction* involving plaintiffs' land, the defendant, Pacific Farwest Mortgage and Escrow Co., has been acting in collusion with the defendant, Northwestern Utilities."

Would not the painstaking strictness of construction required in an insured's behalf dictate a holding that no dishonest acts had been alleged as having been committed by insured *during the transaction* which was the subject of suit? If the court should so in-

interpret this language, we are sure that appellee would concede it is bound by the state court judgment except for its position on the coverage question.

Moreover, it would seem as though there is no presently existing law of Washington which should today accord with the earlier cases³⁰ holding that the cause of action pleaded determines the insurer's *duty* to defend. First, it is to be noted that Lloyds accorded to itself only a *right* and no duty. More importantly, it should be noticed that the Supreme Court of Washington State adopted court rules substantially the same as those of the Federal Courts as embodied in the Federal Rules of Civil Procedure, which state court rules became effective on January 1, 1960 (FRCP, Rule 43 permits judicial notice). It may be, therefore, that this court should exercise a "prophetic" determination of what the Washington Court would hold today in the light of its adoption of "notice pleading."

We respectfully submit that the case of *Milliken v. Fidelity and Casualty Co.* (CA 10, Kan.) 338 F. 2d 35, may afford an excellent precedent.

The Circuit Court, in part quoting the Supreme Court, at p. 40, says:

"Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. * * * It is therefore apparent that the underlying reason or

³⁰*Town of Tieton v. General Ins. Co. of America*, 61 Wn.(2d) 716, 380 P.2d 127, appears to be the most recent example.

basis for the Kansas rule on the duty to defend, i.e., the necessity of pleading facts, is not present when the action is brought in federal court. . . . This court has consistently held that as a general rule the duty of an insurer to defend its insured in federal court litigation is determined in the beginning of the litigation by the coverage afforded by the policy, as compared with the allegations of the complaint filed in the action. But, the allegations of the complaint are not conclusive of the issue. The duty to defend may attach at some later stage of the litigation if the issues of the case are so changed or enlarged as to come within the policy coverage. The reason for this rule is that ' * * * (u)nder the Federal Rules of Civil procedure the dimensions of a lawsuit are not determined by the pleadings because the pleadings are not a rigid and unchangeable blueprint of the rights of the parties. * * * ' Thus, the insurer's duty to defend an action brought in federal court against its insured may arise or attach at any stage in the litigation. And the duty does attach where there are facts, extraneous to the allegations of the pleadings, which, if proved, make out a case against the insurer that is covered by the policy and which either are actually brought to the insurer's attention or could have been discovered by it through a reasonable investigation."

Also, the general rule is that where the facts alleged create only a potential coverage, the duty to defend exists. As stated in *London Guarantee and Acc. Co. v. C. B. White Bros.*, 49 S.E. 2d 254 (1948),

"While the duty to defend is, in the first instance, to be determined by the allegations of the notice of motion, yet if those allegations leave it in doubt whether the case alleged is covered by the policy, the refusal of the insurance company to defend is at its own risk; and if it turns

out on development of the case that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend."

Or, if the allegations are both within and without coverage the duty likewise exists. *Globe Navigation Co. v. Maryland Casualty Co.*, 39 Wash. 299, 81 P. 826.

Too, if "collusion" is regarded as a "conclusion" of the pleader, the insurer would be required to look beyond the pleadings. *Alm v. Hartford Fire Insurance Co.*, 369 P. 2d 216; *Mueller v. Winston Bros. Co.*, 165 Wash. 130, 4 P. 2d 854; *Yeager v. Dunnarvan*, 26 Wn. 2d 559, 174 P. 2d 755; *Hein v. Chrysler Corp.*, 45 Wn. 2d 586, 595, 277 P. 2d 708.

In argument to follow, it will be assumed, *arguendo*, that the second clause of the first sentence of Condition 5 is a condition precedent.

Materiality.

In order to avail itself of a breach of a condition precedent, it is almost universally held that the breach must be material and substantial. *State Farm Mutual Automobile Ins. Co. v. Palmer*, 237 F. 2d 887 (CA 9th 1956); *Chronister v. State Farm Mutual Automobile Ins. Co.*, 353 P. 2d 1059 (N. Mex. 1960); *Fontenat v. Lloyds Casualty Insurer*, 31 So. 2d 290 (La. 1947); *Nicholai v. Transcontinental Ins. Co.*, 61 Wn. 2d 295, 378 P. 2d 287; *Indemnity Co. of No. Am. v. Forrest*, 44 F. 2d 465 (CA 9th Cal., 1930).

The first cited case involved an express condition precedent, about the legal effect of which there was a void of applicable Arizona law on the precise question

of whether a non-prejudicial breach may be an escape for the carrier. After pointing out the wide divergence of opinion among the jurisdictions³¹ as to whether or not prejudice is necessary in order to enable an insurance company to avoid liability based upon failure to cooperate, this court went on to state at 892,

“But *all cases and authorities* appear to be in agreement that the non-cooperation must have been material.” Citing *Standard Acc. Ins. Co. v. Winget*, 197 F. 2d 97, 103; 29 Am Jur, Insurance, Sec. 789, p. 600 and Sec. 795, p. 602.

In *Chronister v. State Farm Mutual Ins. Co.*, 353 P. 2d 1059, (N. Mex. 1960), it is said:

“The great weight of authority holds that to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect.”

This Circuit, applying Washington law, said, in *Hansen & Rowland v. Fidelity Deposit Co.*, 72 F. 2d 151, at 157 (CA 9th Wash. 1934):

“And even as to material facts, the insurer may waive his right to disclosure by his neglect to make inquiries as to data ‘concerning which he has been distinctly put on inquiry by the facts stated.’ ”

Denial of Liability as Waiver

In section 3 of the annotation in 70 ALR 2d, 1197, at 1201, it is stated:

“It has been held that an insurer which dis-

³¹No case is cited so as to categorize Washington in either of the divergent schools. Concededly, it is in the school which does not require prejudice, if, by clear language, a particular condition is expressly made a condition precedent.

claims liability under an automobile liability insurance policy for a reason other than the insured's non-cooperation, and refuses to defend the insured, cannot thereafter assert, in defense to an action on the policy, the insured's breach of the cooperation clause in the policy by conduct occurring after the insurer's disclaimer of liability."

See, 8 Appleman, Insurance Law and Practice, Sec. 4786.

In *Ranallo v. Hinman Bros.*, (1942, D.C. Ohio) 49 F. Supp. 920, aff'd. *Buckeye Union Casualty Co. v. Ranallo* (CA 6th Ohio) 135 F. 2d 921; cert. denied 320 U.S. 745, 88 L. Ed. 442, 64 S.Ct. 47, the district court stated,

"The evidence is clear that notice of loss as provided in the policy was given the Buckeye Union Casualty Co. as required in the policy. The insurer (the Buckeye Union Casualty Co.) in its letter of April 17, 1941 (Plaintiff's Ex. 3), to the insured, wrote:

'In other words, the Buckeye Union Casualty Co. does not assume any responsibility for the above captioned accident and does not agree to pay any kind of judgment rendered in the above numbered case....'

"That letter indicated such finality of decision that any other communication or notice by the insured was a useless gesture, thoroughly meaningless and vain."

Where waiver by denial of liability or coverage is involved, it is not necessary that the denial be express or unequivocal, it being sufficient that the facts and circumstances warrant the inference that liability was or would be denied. *Otterman v. Interstate Fire &*

Casualty Co., 111 N.W. 2d 97 (Neb. 1961); *Am. Fire and Casualty Co. v. Kaplan*, 183 A. 2d 914 (D.C. 1962). Also see: *Pappadakis v. Netherlands Fire Ins. Co.*, 137 Wash. 430, 242 Pac. 641 (1926); *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941 (1907); *Pagni v. New York Life Ins. Co.*, 173 Wash. 322, 23 P. 2d 6 (1933).

Diligence.

Illustrative of the very high degree of diligence required of any insurer to procure the cooperation of the insured before breach of a cooperation clause may be relied upon are the following cases: *State Farm Mutual Ins. Co. v. Farmers*, 387 P. 2d 825 (Ore. 1963); *Carpenter v. Superior Court*, 422 P. 2d 129 (Ariz. 1967); *Iowa Home Mutual Cas. Co. v. Fulkerson*, 255 F. 2d 242 (CA 10, Wyo. 1958); *Marcum v. State Auto Mut. Ins. Co.*, 59 S.E. 2d 433 (W. Va., 1950); *Employers Mutual Cas. Co. v. Ainsworth*, 164 So. 2d 412 (Miss. 1964).

Why such strict requirements? Why do the courts require the insurer to make such a substantial showing of diligence to secure cooperation of the insured? The explanation of the Supreme Court of Oregon bears repeating:

“The motivation of an insurer and an insured may be very different from the motivation of the parties to the usual contract. In the usual contract it is to the promisee’s benefit and advantage to have the promisor perform his contractual duties. If there is any indication that the promisor is not going to perform, the promisee will exert great effort to secure performance. If performance is not secured, the benefit the promisee hoped to gain from entering into the contract is lost. There is no need to impose a legal duty on the promisee

to use diligence to secure the promisor's performance; the economics of the bargain provide ample incentive. The only legal duty that must be inferred, if it is not expressed in the contract, is the duty to notify the promisor that the contractual prerequisites upon which his performance was conditioned have now occurred.

"In an insurance contract the benefit to the promisee, the insurer, may be gained in exactly the opposite manner from that existent in the usual contract, i.e., the insurer benefits if the promisor *fails* to perform. If the promisor, the insured, fails to perform his duty to cooperate, the promisee gains the ultimate benefit; it does not have to pay a loss. There is no economic incentive for the insurer to expend any effort to secure the insured's performance.

"The promisor-insured's motivation may also be very different from that of the usual contractual promisor. The usual promisor hopes to gain a benefit or avoid a detriment by performing. Again, the economics of the bargain usually provide enough incentive to guarantee performance and, if this is insufficient, the financial consequences of a breach of contract supply an additional goad.

"This motivation is usually wholly lacking when difficulty is encountered in securing the cooperation of an insured. Insureds, when uncooperative, usually become so because they cannot see how their cooperation would benefit either themselves or their insurance company. If the insured was a witness to the accident and believes that on trial he will be found to be at fault, he may see no reason why he should be at the trial. If he was not a witness to the accident, he likewise may see no reason why he should be at the trial. Regardless of his attitude about the above matters, if the insured is judgment proof, he may see no pecuniary benefit accruing to him from at-

tending the trial. The type of person most likely to be indifferent to his duties under the insurance contract is frequently the type of person least likely to be concerned about a judgment being obtained against him.

Law or Fact.

In *Massachusetts Mutual Life Ins. Co. v. Mayo*, 81 F. 2d 661 (CA 9th Wash. 1936), this court held that the questions of waiver and estoppel were questions of law for the court. And see *Thompson v. Ezzell*, 61 Wn. 2d 685, 379 P. 2d 983.

Before leaving this subject of non-cooperation, might we not once more carefully read the language, i.e., "*The Assured . . . upon request, shall give to Underwriters such information as Underwriters reasonably require and as may be in the Assured's power.*"

Here, *no request* was ever made of the *assured*, Pacific Farwest, the corporate insured. The letters of inquiry, wherein certain pleadings and documents were requested, were all addressed to Yates and Yates, attorneys. We dare say that the insurer's counsel crossed his fingers and hoped his fellow-counsel might be too busy to answer. None were addressed to Mr. Yates as an *officer* of the corporate insured, if the latter indeed remembered that he was. Mr. DeCrane Cooke was obviously the office manager and the insurer knew or should have known from his application, which forms a part of the policy, that he was the experienced escrow man. Admittedly, the insurer was told by letter from its own sub-agent to get any additional information from Mr. Cooke. Did not a modicum of diligence demand acceptance of the invitation contained in Ex. 5? Could the insurer *reason-*

ably require Mr. Yates, a busy attorney, and not its assured, to do its leg work for it at *Mr. Yate's expense*?³²—particularly, after having *denied coverage* to that attorney's client?

Under abundant law, the insurer here fell woefully short of proving the diligent effort required of it in order to rely upon a breach of this cooperation clause.

Burden.

“In an action upon an accident insurance policy, the burden which the injured plaintiff assumes is to show that injury or death was due to accidental or other means specified in the policy. But on the defendant insurer rests the duty to show that the injury or death was caused by some act which is made an exception to the risk in the policy, or that the policy has been avoided by reason of a breach of some condition precedent, or that the action was not brought within the time required by the policy. *Starr v. Actna Life Ins. Co.*, 41 Wash. 199, 83 ac. 113, 4 L.R.A. (N.S.) 636; *Wallin v. Massachusetts Bonding & Ins. Co.*, 152 Wash. 272, 277 Pac. 999; *Bjorklund v. Continental Casualty Co.*, 161 Wash. 340, 297 Pac. 155; *Selover v. Actna Life Ins. Co.*, 180 Wash. 236, 38 P. (2d) 1059; *Hill v. Great Northern Life Insurance Co.*, 186 Wash. 167, 57 P2d 405.”

G. May the Insurer Re-litigate the Issue of its Insured's Liability to Appellant?

Appellants earnestly submit that the insurer is bound by the findings and judgment entered against

³²See Proviso and Condition number 2.

its insured escrow agent in the Superior Court of King County, Washington, if

- (1) it had notice of the proceedings and an opportunity to make the choice unequivocally reserved to itself by Proviso and Condition 2.
- (2) if the insured did not breach the conditions of the certificate of insurance, or if a breach occurred, then, if the insurer waived the same.
- (3) if the facts essential to the state court judgment were such as to constitute a loss within the coverage of the policy.

If appellee in this action had the right to and the opportunity to appear in the earlier action to defend or aid in the defense against the claim, and chose not to so do, then the judgment, as well as any findings essential to the judgment, are binding upon it. *East v. Fields*, 42 Wn. 2d 924, 259 P. 2d 639; *O'Toole v. Empire Motors, Inc.*, 181 Wash. 130, 42 P. 2d 10; *Johnson v. McGilchrist*, 174 Wash. 178, 24 P. 2d 607; *Brown v. Underwriters at Lloyd's*, 53 Wn. 2d 142, 332 P. 2d 228; 1 Freeman Judgments (5th ed.) 978, Sec. 447; 30 Am. Jur. 969, Sec. 237; Restatement, Judgments 511, Sec. 107.

Only the third point above requires further comment.

Appellee has contended throughout that the state court's finding of *negligence* on the part of Pacific Farwest is not binding on the question of policy coverage. Arguendo, only, let us agree.

However, we just as vigorously argue that any fact

that must necessarily have been found in order to support the judgment *is binding* on appellee. Manifestly, it was necessary that the Court have found it was *not right* for Pacific Farwest to have released the deed. Obviously, even if it had not been characterized at all, it still would have been *implicit* in the judgment against Pacific Farwest that it had committed an error "in or about the conduct of... business conducted by... (it)... in their (sic) professional capacity as Escrow Agents." It had to be *either* a breach of contract, or a breach of contract sounding in tort, or pure tort. (It could have been done criminally or fraudulently but both parties agree it was not.) Now, whether one says the insured omitted to avail itself of its right to interplead, or, as a reasonably prudent escrow, it should have foreseen the hazard to plaintiffs, or that it simply acted in breach of its agreement of escrow, it remains that *it was in error* in releasing the deed, and, insofar as it was in error in releasing the deed, that obvious and implicit finding is binding and, if being in error in releasing the deed calls for coverage, it is conclusive of that issue.

If it were important to appellant's position, however, that Pacific Farwest's acts be characterized specifically according to legal concepts, we would not lightly concede that the specific findings of negligence and breach of contract are not binding upon appellee. It will be observed (Ex. 4) that this was a case against multiple defendants whose respective individual conduct was so interrelated that it became the very essence of the litigation to determine the role played by each defendant and to categorize that role into its appropriate legal slot. In days gone by it would have been said that the action against the main actor, Northwestern, being an action in equity, the Court

was entitled to treat the action in toto as being primarily of equitable cognizance. Today we have one form of action but, when called for, all of the concepts of equity still apply. The trial judge's task in state court was to effect justice between all of the parties, and his decision concerning the role played by each and the basis of their respective rights and liabilities was in no way a decision on matters incidental to or collateral to the judgment but thereto most essential.

And see, *Johnson v. McGilchrist*, 174 Wash. 178, 24 P. 2d 607; *O'Toole v. Empire Motors*, 181 Wash. 130, 42 P. 2d 10.

SECTION II

In connection with part 1 of specification of error IV, that portion of Finding of Fact 20 (R. 254) is objectionable because of the court's use of the word "likelihood" in the first sentence thereof. The president of Pacific Farwest, in answer to the inquiry of counsel for appellee whether the witness "... understood that there was a distinct *possibility* ..." (emphasis added) that Pacific Farwest would be sued, replied "Yes" (Tr. 175). See also (Tr. 198). The use of the word "likelihood" and the following use in that same sentence of the words "intentionally and wilfully" might suggest that Pacific Farwest intended harmful consequences in its act of releasing the deed. This is not borne out by the evidence, nor by the consistent position taken throughout by appellee. As heretofore noted, the appellee has maintained that Pacific Farwest was correct in releasing the deed, and it is clear from the record that Pacific Farwest believed that it was legally justified (Tr. 167-168) in so doing, as likewise, apparently did its attorney, Mr.

Yates (Tr. 156-157). The second and last sentence of the criticized portion of Finding of Fact 20, in view of the issues framed in this case, must be determined to be a conclusion of law and not a finding of fact.

Part 2 of specification IV, Finding of Fact 22 (R. 255), has heretofore been discussed.

Part 3 of specification IV, Finding of Fact 25 (R. 256) is significantly incomplete in its omission to set forth *both* reasons announced in the carrier's letter (Ex. A-22), as the basis for declining coverage.

Part 4 of specification IV, dealing with the last portion of Finding of Fact 20 (R. 257) first sets forth a statement constituting a conclusion of law. It has been heretofore argued, both that the policy in question is absent a "suit forwarding clause" and, further, that the proviso appearing immediately above the objectionable portion of this Finding of Fact 20, contains a single condition precedent, i.e., notice of claim, compliance with which is not in dispute. This objectionable sentence *presupposes* that a sufficient effort had been made by the insurer to obtain what was requested and the authorities cited herein do not warrant such a conclusion. A further objection to the entire sentence stems from appellant's position that the insurer waived all of these so-called requests by declining coverage on an *untenable ground*, i.e., that the intentional act of releasing the deed is not covered by the subject policy. The second sentence of this finding is also objectionable because of its inclusion and placement of the words "...determination...intentional decision..." which might suggest that the thinking of Mr. Yates was to *obstruct* the insurer as opposed to the clear evidence that he saw no useful

purpose to be served by complying with Mr. Moss's letter of May 24, 1965 (Ex. A-26) because Mr. Moss had indicated that coverage would not be allowed because of the *intentional* nature of the act involved, that is, the conscious act of releasing the deed, and that the elimination of the allegation of collusion did nothing to change this objection on their part (Tr. 85, 87, 92).

In connection with part 5 of specification IV, it is first to be noted that every portion of finding No. 31 (R. 257-258) to which objection is made deals with matters which took place *subsequent* to the trial in the King County Superior Court action, specifically after the trial judge had orally announced his decision to find in favor of plaintiffs, Kienle against several of the defendants in the action, including the defendant Pacific Farwest. Many of these found facts are in conflict with the testimony, and irrespective of this, it is submitted that these recitals are of no consequence in view of the fact that they pertain to a period of time after the trial in the state court, well beyond a time when the appellee-insurer should have used such efforts to gain these papers and information.

Parts 6 and 7 of specification IV deal with Findings of Fact numbered 32 and 33, respectively (R. 258-259) and again contain statements which were in sharp conflict with the testimony. These findings likewise pertain to matters which may have occurred long after the proverbial horse "got out of the barn" and, in view of the applicable law pertaining to this case, are neither material nor relevant herein.

Finally, part 7 of specification IV deals with Finding of Fact No. 41 (R. 259-260) and, in view of the issues framed herein, amounts to a conclusion of law.

It completely presupposes that the findings and judgment of the state court action are not binding on this insurer.

SECTION III. The Court Erred in Denying Appellants' Motion for Summary Judgment.

The *material* factual issues in this case were not in dispute.

Throughout this litigation both sides have contended that, upon the admitted facts, this case should be decided as a matter of law. Cross-motions for summary judgment were made. These motions were denied. A trial was declared necessary because

“(T)he court finds, concludes and decides that here there are one or more genuine issues as to material facts, one of which facts is as to whether the policy provisions insure against the acts of the defendant³³ complained of by the plaintiff.” (Tr., Aug. 11, 1967 Pro., p. 2, ll. 2-6).

Actually, *appellee* attempted to point out to the trial court that “(T)he issue of policy coverage is essentially one of law.”

The trial which followed was viewed by both sides as largely a “mock” trial wherein already existing agreed facts were put into the form of trial evidence. At its conclusion, the trial judge ruled

“that the defendants are not bound by the state court judgment” because “the insured... (1) did not give notice to defendant insurers of the amended complaint which was based on a new cause of action, and (2) the insured did not fur-

³³Obviously, the court meant the defendant in the earlier action.

nish the suit papers in the state court action to which papers, under the policy provisions, the defendants were entitled and did request copies of without success.” (R. 239, ll. 21-25).

Certainly, no trial was necessary to reach this result, because it is dependent (although we insist erroneously) only upon facts of which there was no real dispute.

Then, later, when Findings and Conclusions were entered, they, in effect, eviscerated the oral opinion so that it became completely unnecessary to a decision. That is so because the court has now found that, no matter how correct had been the notice given—no matter how strictly had been the compliance with conditions—the admitted fact that the deed was *intentionally* released from escrow barred any recovery.

We respectfully suggest that it was just such procedural patterns as this which inspired Professor James Wm. Moore to state on p. 2284, 6 Moore Federal Practice,

“A difficult question of law does not . . . warrant the denial of a motion for summary judgment, subject to the following important qualifications: that the *material* factual issues are not in dispute and furnish an adequate basis for the application of the proper legal principles. In this event nothing is to be gained by a denial of the motion, for resolution of the question does not become easier through a process of postponement.”

Hesitancy and judicial reserve in the use of FRCP Rule 56 is desirable and commendable. At the same time, we respectfully suggest that fear of its use should not be allowed to atrophy its salutary role in the judicial scheme. Was not the instant case quite

tailored for its application? Insurance liability avoidance cases perhaps lend themselves, more than most other cases, to this procedural timesaver. Here, it is difficult to see wherein "*conflicting inferences*" could have been drawn on matters *material* to the judgment. *Thompson v. Ezzell*, 61 Wn. 2d 685, 379 P. 2d 983.

The court, we earnestly feel, was once again in error in denying appellants' Motion for New Trial and Amendment of Findings.

Appellants' counsel are quite mindful of the propriety, under the decisions of this court, of the trial judge delegating to counsel the task of *preparing* the Findings of Fact and Conclusions of Law, although the same practice is strongly disapproved in other circuits.³⁴ *Simons v. Davidson Brick Co.*, 106 F. 2d 518 (CA 9th 1939); *U.S. v. Cornish*, 348 F. 2d 175, 181 (CA 9th 1965).

However, in a case involving so many interdependent legal concepts, for prevailing counsel to possess the prescience to know exactly how the trial court would rule on all of these points of law without being told in advance, must pique one's curiosity.

Appellee's memorandum, resisting this post-trial motion of appellants, explains that this was what the judge ruled, i.e., that he had concluded his oral decision by finding the issues in favor of the defendant (R. 276, referring to the oral opinion at R. 241). Of course, this still called for enough prescience to know

³⁴*Roberts v. Ross*, 344 F.2d 747 (CA 3rd 1965) at 751-752. In *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d, 719 (1961) the court states at 724, that "The manner in which the opinion of the district judge was prepared in this case cannot be approved."

that the judge did not want to rule on the issue of indemnity versus liability which had occupied a good deal of time throughout the litigation.

Appellants' counsel may have been guilty of naivete, but earnestly represent to this court that they were truly misled by the trial court stating, less than three weeks earlier, with no uncertainty, that

“That is what the court decides (orally announced decision) and nothing else.” (Tr., Part 2, Aug. 11, 1967, proceedings, p. 5, ll. 23-25).

It was for this reason that appellants, after service upon them of the voluminous findings and conclusions proposed by appellee, prepared their own proopsed set confining them to only the points the court had decided — accompanying the same with a statement of purpose.

Upon presentation, appellants were not prepared to properly make their objections to all of the findings and conclusions dealing with points upon which they had every reason to believe had not been decided by the court.

Especially should appellants' counsel have so believed when it is so well settled that it is not necessary for a court to decide *every* issue presented to him when those that he *has decided* are sufficiently *determinative* of the case. *Parker v. St. Sure*, 53 F. 2d 706, 708 (CA 9th Cal. 1931); *Klimkiewicz v. Westminster Deposit Co.*, 122 F. 2d 957 (CA, DC, 1941). And as stated in *Matton Oil Transfer Corp. v. The Dynamic*, 123 F. 2d 999, 1001 (CA 2nd N.Y. ED 1941), findings should be

“brief and pertinent”... “rather than the de-

layed, argumentative, over-detailed documents prepared by winning counsel....”

Or as the court says in *Petterson Lighterage Corp. v. N.Y. Central*, 126 F. 2d 992, 996 (CA 2d 1942),

“Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law.”

SECTION IV

CONCLUSION

Perhaps the potential of harm to members of the public in the area of escrow transactions is less grave than that which has prompted widespread enactment of automobile financial responsibility or compulsory liability insurance laws. Certainly the experiences of loss are far fewer—but individual losses, as here, may be substantially greater. Those concerned with the interest of the public and the security of the individual citizen should abhor the thought that the appellant's plight should befall anyone and that one be without recourse. We earnestly submit that there are public policy considerations involved in viewing this tri-partite transaction comprised of the victim, the insured escrow, and the insurer. Established institutions such as banks or title insurance companies are rarely ever unable to respond to the damaged party whose injury is traceable to their mistakes. But of late there has emerged a new business, often called a mortgage-escrow company who proclaims to the public “Have no fear—an insurer is near.” Various methods are employed to convey to the public at large this inviting assurance—in this instance at least by

the use of the words "Bonded and Insured" at the bottom of the escrow's stationery.

What do we see when we look into each side of this prism? The member of the public at least feels more secure knowing that he is dealing with an insured escrow. The escrow has that for which he bargained, a more confident client, who as a member of the public, has certainly made no such investigation as an insurer might be expected to make upon an insurance application, in respect to the solvency of the company or the personal judgments of its principals.

When we look through the prism's third side we see an insurer with a world-wide reputation for solvency and financial integrity who is quite aware of the image it has created and is quite pleased with the financial profit derived from this image — and is quite aware that for a premium it has sold a portion of this image to the escrow.

In short, we see a picture which strongly suggests that such insurer at least be required to use some modicum of care to see to it that the public is not misled.

The liability policy here very easily could have provided that, in the case of a loss arising out of a pre-claim conflict between the parties, the insurance would be ineffective unless the parties were interpleaded in a declaratory judgment action. That it did not, is the fault of the insurer, and none other.

Understandably, courts should be concerned with the possibility of collusion between injured and insured. Here, the facts utterly scream out against any

such inference. Quite as subject to scrutiny by the courts will be the insurer's role in such a situation as here presented. An *insolvent* stands to gain nothing from cooperating with his insurer and is not likely to be overly concerned with the liability of the insurer. When the resultant indifference is brought to the attention of the insurer should not the courts subject the insurer's letter writing activities to a most exacting scrutiny? How earnest and sincere can the insurer be in its quest for information when it bypasses the invitation of the injured party's attorney who, it well knows, will be panicked into a flurry of breach-healing activity at the slightest suggestion that the insured is not cooperating? The insurer, here, was not attempting to *produce cooperation* by its letters but was attempting to *produce a synthetic defense*.

One who "whispers for help in the darkness" should not be heard to later complain that no one responded to his whisper.

Respectfully submitted,

ORVIN H. MESSEGEY

and

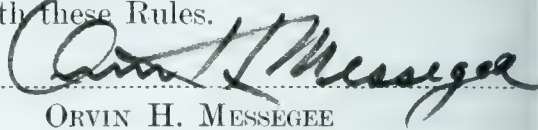
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these Rules.



.....

ORVIN H. MESSEGEE

.....

JEREMIAH M. McCORMICK

Appendices

APPENDIX A

PLAINTIFFS' EXHIBITS

No.	Document	Page of Transcript where	
		Offered	Admitted
1.	Certificate of Insurance.	16	18
2.	Judgment & Decree, Cause No. 630 691.	18	19
3.	Amended Complaint, Cause No. 630 691.	19	19
4.	Findings && Conclusions of Law No. 630 691.	20	20
5.	Letter from Jeremiah M. McCormick to Gordon W. Moss, dated May 20, 1965.	21	21
7.	Letter dated December 1, 1964 to Wood Ins. from Pacific Farwest Mortgage & Escrow 21	21	21
8.	Letter dated ct. 26, 1964 to Howard R. Kienle from Pacific Farwest Mortgage & Escrow 27	27	29
9.	Letter date 12/5/1964, to Voight- Walker & Co. from Wood Ins. Co. 105	105	106

DEFENDANTS' EXHIBITS

No.	Document	Page of Transcript where	
		Offered	Admitted
A- 2.	Sellers' Escrow Instruction	148	149
A- 7.	Letter dated July 17, 1964 from attorney Gouge to Pacific Farwest.	142	146
A- 8.	Letter dated July 23, 1964 from attorney Carpenter to Pacific Farwest	142	146

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DEFENDANT'S EXHIBITS (Continued)

<i>No.</i>	<i>Document</i>	<i>Page of Transcript where Offered Admitted</i>	
A- 9.	Letter dated 7/28/64 from attorney Youngberg to DeCrane Cooke of Pacific Farwest	164	165
A-13.	Mortgage to Pacific Farwest from Northwestern Utilities, dated 8/18/64.	176	177
A-19.	Letter dated Aug. 20, 1964, from Pacific Farwest to Fidelity Savings & Loan Ass'n.	178	179
A-20.	Complaint, Cause No. 630 691. ..	67	70
A-21.	Copy of letter from Yates & Yates, dated 12/7/64 to Voight-Walker & Co.	67	70
A-22.	Letter from Gordon W. Moss, dated 2/15/65 to Yates & Yates..	60	60
A-26.	Letter from Gordon W. Moss, dated 5/24/65 to Yates & Yates..	61	63
A-27.	Letter from Gordon W. Moss, dated 12/1/65 to Leslie M. Yates	95	97
A-28.	Letter from Gordon W. Moss, dated 5/18/66 to Leslie M. Yates.	95	97
A-29.	Oral Opinion, Cause No. 630 691.	206	209
A-30.	Original Indemnity Agreement.	201	202
A-31.	Promissory Note dated 8/19/64.	203	204

APPENDIX B

ESCROW AGENTS' INDEMNITY FORM

WHEREAS the person or persons whose name is, are mentioned in the schedule herein carrying on business under the firm and style in the said schedule (hereinafter called "the Assured", which expression shall include the aforesaid person or persons and any other person or persons who may at any time and from time to time during the subsistence of this Certificate be a partner therein or any one or more of them) have made a written proposal bearing the date stated in the said Schedule and containing particulars and statements which it is hereby agreed are the basis of this Certificate and a copy of which is attached hereto and made a part hereof and have paid the premium stated herein, Underwriters in consideration of the foregoing do hereby agree to indemnify the Assured, to the extent provided herein and subject to the terms and conditions hereof, against liability and costs in respect to any claim or claims which may be made against the Assured during the subsistence of this Certificate by reason of any negligent act, error or omission whenever or wherever the same was or may have been committed or alleged to have been committed on the part of the Assured or their predecessors in business or any person now or heretofore employed by the Assured or their predecessors in business or hereafter to be employed by the Assured during the subsistence of this Certificate in or about the conduct of any business conducted by or on behalf of the Assured or their predecessors in business only in their professional capacity as Escrow Agents'.

SCHEDULE

Name and style of the Assured: Pacific Farwest Mortgage & Escrow Co.

Addres or addresses of the Assured. 2525-6th Ave. nue, Seattle, Washington.

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Date of the Proposal: March 12, 1964.

The sum insured under this Certificate: \$100,000.00.

PROVISOS AND CONDITIONS

1. The liability of Underwriters hereunder shall not exceed in the aggregate for all claims under this Certificate the sum stated in the said Schedule (hereinafter referred to as "The Sum Insured") except that Underwriters will pay costs as herein provided, subject to the conditions herein expressed).
2. Underwriters, if they so desire, shall be entitled at their own expense to take over and conduct in the name of the Assured the defense or settlement of any claim.

Attached to and forming part of Certificate No. 18201.

Issued to: Pacific Farwest Motrgage & Escrow Co.

Dated: March 30, 1964.

3. In the event of Underwriters requiring any claim to be contested by the Assured, Underwriters will pay all costs, charges and expenses in connection therewith, subject nevertheless to the following conditions:
 - (A) If the claim is successfully resisted by the Assured, Underwriters will pay all costs, charges and expenses incurred by the Assured in connection therewith up to but not exceeding the sum insured.
 - (B) If a payment has to be made to dispose of a claim in excess of the sum insured, Underwriters' liability to pay any costs, charges and expenses in connection therewith shall be limited to such proportion of the said costs,

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charges and expenses as the sum insured bears to the amount paid to dispose of the claim.

4. There shall be no liability hereunder in respect of any claim or claims for which the Assured is entitled to any indemnity under any other policy in force previous hereto as a result of the Assured, before the commencement of this Certificate, having given written notice to the Insurers on such other policy attaching such claim or claims to such previous policy in manner hereinafter provided.
5. The Assured shall as a condition precedent to their right to be indemnified under this Certificate give to Underwriters immediate notice in writing of any claim made upon them and further, upon request, shall give to Underwriters such information as Underwriters may reasonably require and as may be in the Assured's power.

If during the currency hereof:

- (A) The Assured shall receive written notice from any third party that it is the intention of such third party to hold the Assured responsible for the results of any specified alleged negligent act, error or omission; or
- (B) The Assured shall become aware of any occurrence which may subsequently give rise to a claim being made against them in respect of any alleged negligent act, error or omission;

and shall in either case during the currency hereof give written notice to Underwriters of the receipt of such written notice under clause (A) or of such occurrence under clause (B) then any claim which may subsequently be made against the Assured arising out of such alleged negligent act, error or omission, shall for the purpose of this insurance be treated as a claim made during the currency hereof.

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6. This Certificate does not extend to indemnify the Assured in respect of any claim:
- (A) For libel or slander; or
 - (B) Brought about or contributed to by the dishonesty of the Assured or any of their employees; or
 - (C) Based upon or arising out of an Act of Congress of the United States of America known as the "Securities Act of 1933", approved May 27, 1933, or any amendment thereof or addition thereto; or
 - (D) Based upon or arising out of any opinion of title on real estate rendered or furnished by the Assured or by any predecessor of the Assured.

ENDORSEMENT #1

In consideration of the premium paid hereon, it is understood and agreed that no liability shall attach to Underwriters in respect of the first \$500.00 (Five Hundred Dollars) of each claim.

All other terms and conditions remain unchanged.

Attached to and forming part of Certificate No. 18201 of the Underwriters at Lloyd's, London.

Issued to: Pacific Farwest Mortgage & Escrow Co.
Effective date: March 16, 1964.

VOIGHT-WALKER & CO., INC.

APPENDIX C

(Under FRCP, Rule 43 this court may judicially notice Statutes of Washington).

PERTINENT PORTIONS OF WASHINGTON STATUTES

By statutes in Washington, RCW 48.01.040, "insurance" is thus defined: "Insurance is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies."

R.C.W. 48.01.030: "PUBLIC INTEREST. The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rest the duty of preserving inviolate the integrity of insurance."

R.C.W. 48.18.200 LIMITING ACTIONS, JURISDICTIONS.

- (1) No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation or agreement
 - (a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country . . ."

R.C.W. 4.72.010 provides: "The superior court in which a judgment of final order has been rendered, or made, shall have the power to vacate or modify such judgment or order: . . .", if such application is

made within one year from date of entry, (R.C.W. 4.72.020)

R.C.W. 4.32.240 provides: "The Court may . . . relieve a party . . . from judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect",

R.C.W. 48.18.190: "POLICY MUST CONTAIN ENTIRE CONTRACT. No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."



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R.C.W. 48.18.190: "POLICY MUST CONTAIN ENTIRE CONTRACT. No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."



22466

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOVIE CARL MATHIS,

Petitioner and Appellant,

vs.

LOUIS S. NELSON, Warden,
California State Prison,
Tamal, California,

Respondent and Appellee.

No. 22469

APPELLEE'S BRIEF

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FILED

APR 27 1964

W. B. LUCH

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOVIE CARL MATHIS,)	
)	
Petitioner and Appellant,)	No. 22469
)	
vs.)	
)	
LOUIS S. NELSON, Warden,)	
California State Prison,)	
Tamal, California,)	
)	
Respondent and Appellee.)	

APPELLEE'S BRIEF

JURISDICTION

Appellant, seeking review of an order of the district court denying his petition for a writ of habeas corpus invokes the jurisdiction of this Court under Title 28, United States Code section 2253.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

After jury trial in the Superior Court of Santa Clara County, appellant Dovie Carl Mathis, petitioner below, was convicted of murder in the first degree and after a trial on the issue of penalty, was sentenced to death. On his automatic appeal to the Supreme Court of California, appellant's conviction and sentence were affirmed. People v. Mathis, 63 Cal.2d 416 (1965).

Appellant's application for a writ of certiorari to review this decision was denied on October 10, 1966. Mathis v. California, 385 U.S. 857 (1966).

Habeas corpus petitions addressed by appellant to the Supreme Court of California were denied on January 19, 1966, and November 23, 1966 (TR 5-6).^{1/}

B. Proceedings in the federal courts.

On November 29, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (TR 1). On November 29, 1966, District Judge Albert C. Wollenberg issued an order to show cause and the following day, appointed counsel to represent appellant (TR 65, 66).

On December 2, 1966, Lawrence E. Wilson, at that time the warden of San Quentin prison, appellee's predecessor and respondent below, filed a return to the order to show cause (TR 67).

On December 13, 1966, the district court issued a stay of execution and ordered an evidentiary hearing (TR 143).

An evidentiary hearing was held on February 10, 1967, following which the parties filed briefs and the

1. "RT" refers to the transcript of record filed in this Court.

matter was submitted for decision.

On September 29, 1967, the district court entered an order denying appellant's application for the writ and discharging the previously entered stay of execution, it being further ordered that the order discharging the stay was itself stayed for a period of sixty days in order that petitioner might if so advised have time to undertake an appeal.^{2/} (TR 211, 224).

On November 27, 1967, the district court granted appellant's motion for leave to proceed in forma pauperis and certified that there was probable cause for his appeal (TR 225, 226). Notice of appeal was filed that same day (TR 228).

STATEMENT OF FACTS

The facts which gave rise to petitioner's conviction were fully stated in the Supreme Court of California (TR 75-119), from which we quote as follows:

"The two defendants [appellant Mathis and Billy Clyde Still, his accomplice] were convicted of killing Vernon Ray in the process of robbing him of approximately \$600 which he had on his person. The events took place on the

2. A copy of the opinion of the district court is attached hereto as "Exhibit A."

evening of Saturday, October 19, 1963, and the early morning hours of Sunday, October 20, 1963, after Ray had displayed a large amount of cash in the presence of a waitress at Fisher's bar in San Jose. Ray had been in the bar early Saturday evening and had left shortly before 8 p.m.

"Bill Still arrived at Fisher's bar sometime during the evening after Ray had left, and heard tales of the money from the waitress. Mathis arrived later, and Still recounted the story to him, calling upon the waitress to confirm it. Testimony was offered which established that both defendants were in financial straits that evening.

"Sometime after midnight Mathis proposed that the two leave the bar. He then drove Still to the home of his sister in San Jose where they admitted themselves with Mathis's key and telephoned Ray. Mathis told Ray that his car was stuck in the mud in Alum Rock Park, in San Jose, and asked Ray to drive to the park and pull him out with his pickup truck. Ray agreeably consented and, upon informing

his wife and guests of his intentions, left his home about 1:30 a.m.

"Mathis and Still then drove to Alum Rock Park, positioned their automobile off the road and waited for Ray who arrived momentarily. Mathis, meanwhile, had instructed Still to take the revolver he had in his car and hit Ray over the head with it at an appropriate moment. Still objected to the use of the revolver, so Mathis then proposed that Still use a tire wrench which he obtained from the trunk of his car. Still took the wrench and hid in the bushes nearby.

"When Ray arrived he backed his truck to the Mathis car, connected a line between the two vehicles, and attempted to tow the car. Mathis, however, placed his foot on the brake of his car to create the impression that the car was stuck. He eventually released the brake allowing Ray to pull the car free, whereupon Ray got out of his truck and proceeded to release the cable. At that moment, as Ray bent over the towline, Still crept up from behind and hit him over the head with the tire iron.

Ray was stunned, but not unconscious, and fled to a nearby creekbed. Mathis and Still chased him, and Mathis caught him at a point a quarter of a mile up the creek. A scuffle ensued during which Mathis knocked Ray unconscious with a large rock. He then told Still to get the money from Ray's pocket, and this Still did. Mathis then administered the coup de grace by striking several frontal blows to the head of the supine victim with either the same or another large rock.

"The two then departed from the scene, Still, driving Ray's truck, using a pair of gloves furnished by Mathis, and Mathis driving his own car. Mathis returned to the apartment in East Palo Alto where he lived with a young woman named Kathy Taylor, arriving about 3 a.m. He complained of an injured thumb, telling Kathy that he had been a fight and that if anyone inquired she was to say that he had been home since 8 p.m. that evening.

"Mathis and Still met on Sunday morning and disposed of the clothes they had worn the previous night by throwing them into the bay.

About 3 p.m. Sunday, Mathis was arrested by San Mateo County sheriff's deputies and taken to the Redwood City jail where San Jose police officers questioned him. Mathis told them he had been home all night, and Kathy confirmed his story. He was then taken to San Jose for further questioning until about 11 p.m., when he was allowed to sleep. At the time he was arrested Mathis's thumb appeared to be split, but he had no other serious injuries. He told officers that he had caught his thumb in the door of his car.

"On Monday morning the interrogation resumed about 8:30 a.m. and Mathis continued to deny all, even when told that Kathy had changed her story and had admitted that he had not returned home until 3 a.m. During the course of the interrogation Monday morning Mathis requested to see his attorney. He was then being represented by Cyril Ash, a San Jose attorney, in another criminal matter. The officers attempted to telephone Ash, but his line was busy. The questioning continued.

"At 11 a.m. Monday, Still was arrested

and immediately gave a complete statement to the police implicating Mathis as the major perpetrator of the crime. Confronted with the evidence the police now possessed, Mathis again requested to see his attorney and again the police placed a call to Ash's office, this time reaching his secretary who told them the attorney was in court. The officer left word for Ash to call the police department in regard to a client who wished to see him. Following this call Mathis agreed 'to tell the truth,' and a recorded statement was taken from him. That statement was later introduced at the trial.

"The statement which Mathis gave, however, was neither a confession nor the truth. It was an attempt to absolve himself from both the robbery and the murder by casting suspicion upon a third individual. Mathis told the police that although he had been in Alum Rock Park and had parked his car off the road as though stuck, he had done so at Still's suggestion; that he had merely accompanied Still at the latter's importuning and had no idea what

Still planned to do about Ray's money; that while Ray was hooking up the tow cable, a mysterious stranger appeared from the bushes and, confusing him with Ray, hit him, Mathis, over the head, rendering him unconscious; that the stranger and Still then robbed and killed Ray. He indicated that the stranger resembled a person named Larry Jones he had seen talking with Still at Fisher's bar.

"The police then apprehended Jones, who was held for a brief period and released when his alibi was substantiated. During the remainder of the investigation Mathis gave no further statements, and, during a trip to the scene of the crime with Still, he urged Still not to cooperate with the police, reminding him that he had no duty to do so.

"At the trial the recorded statement was used to discredit the appellant's veracity. The prosecution demonstrated that the exculpatory elements of the story were fabrications. Mathis, testifying on his own behalf, admitted enticing Ray into the park, but said it was part of a plan devised with Mrs. Ray to test

Ray's fidelity to his wife. He said that he was surprised when Still hit Ray over the head. He denied giving Still the tool and said that Still had disappeared into the bushes as soon as they had parked the car and that he assumed it was because Still needed to relieve himself. According to Mathis, Still did not hit Ray hard enough to knock him unconscious and Ray had then taken the tool from Still and charged after Mathis while uttering oaths about Mathis 'playing around' with his wife. Mathis said he ran to the creek where Ray eventually caught up with him. Ray attempted to hit him several times while Mathis protested that he did not want to fight. After warding off several blows Mathis managed to trip Ray, who fell into the creek. Mathis said he then picked up a rock and hit Ray once on the back of the head and then ran from the scene. He said that Still had apparently followed them down to the creek, waited until Mathis hit Ray and ran, and then had taken Ray's money and killed him.

"Appellant testified he had given a false

statement to the police because he was tired and depressed, wanted to see his lawyer, and thought that if he told a story that brought a new suspect into the investigation he would gain some time and relief from the questioning.

"At the penalty phase of the trial the prosecution asked for the death penalty for Mathis but not for Still. Two character witnesses testified to instances of prior violence by Mathis for which he had been convicted. The district attorney stressed that Mathis had tried to implicate an innocent man in this crime." 63 Cal.2d at 419-422.

In the proceedings below, appellant's principal contention was the the extrajudicial statement of October 20, 1963, described in the California Supreme Court opinion, supra, was involuntary and therefore its admission at the state trial worked a denial of due process of law. In its opinion, the district court summarized the circumstances surrounding that confession as follows:

"The crime of which petitioner was convicted took place around 1:30 a.m. on October 20, 1963. Petitioner was arrested at

about 3:00 p.m. that same day. After being arrested he was taken to the San Mateo County jail in Redwood City, and questioned by the San Jose police for about half an hour. Petitioner at this time told police that he had been home all night and knew nothing about the crime. About 6:00 p.m. he was taken from Redwood City to the San Jose Police Station, and from 7:00 p.m. to 11:00 p.m. he was questioned further. His story that he had been home all night did not change. At 11:00 p.m. he was taken to the Santa Clara City Jail, and was left alone until 8:00 a.m. the next morning, Monday, October 20, 1963. At this time he was taken back to the San Jose police department and questioned further. All morning he stuck to his alibi that he had been home all night.

"Sometime after noon petitioner changed his story, and at 2:45 p.m. he made a formal statement to the police which was transcribed on a recording disc with his knowledge. In this statement he retracted his first story and admitted being at the scene of the crime at the time of the crime, but said that he was

not responsible for the murder and gave an elaborate explanation about what happened. At trial petitioner took the stand and told a third story regarding the events which took place at the scene of the crime and repudiated many of the points set forth in the statement referred to above. The statement was introduced at trial and the disc recording played to the jurors for the purpose of putting petitioner at the scene of the crime and as evidence of prior inconsistent statements." (TR 212-213).

APPELLANT'S CONTENTIONS

1. The district court was in error when it concluded that petitioner's extrajudicial statement was not involuntary.

2. The district court erroneously concluded that no constitutional rights of appellant were violated by references to the Alum Rock Park re-enactment.

3. The district court erroneously refused to apply the Escobedo rule^{3/} to this case.

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3. Escobedo v. Illinois, 378 U.S. 478 (1964).

SUMMARY OF RESPONDENT'S ARGUMENT

I. The district court correctly found that appellant's statement was voluntary.

II. No prejudice to appellant resulted from the incidental comment on his failure to participate in a re-enactment of the crime.

III. The district court was not required to apply the Escobedo rule to petitioner.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANT'S STATEMENT WAS VOLUNTARY

Appellant's principal contention on this appeal is that his extrajudicial statement of October 21, 1963, was involuntary in that it was the product of psychological coercion. Before addressing ourselves directly to this contention, we would note, however, that this Court is not called upon to try the issued of voluntariness de novo, but rather to determine the decision of the district court was correct. This decision comes before this Court buttressed by a double presumption of correctness. First, Rule 52(a) of the Federal Rules of Civil Procedure provides that on appeal findings of fact shall not be set aside unless clearly erroneous and that due regard shall be given to the opportunity of the trial

court to judge the credibility of the witnesses. This rule has been applied by this Court in habeas corpus cases in analogous situations where the district court, after a hearing, has found that a plea of guilty was voluntarily entered. See Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967); Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964).

In addition to the above-noted presumption, a separate and distinct presumption of correctness applies in this case by virtue of Title 28, United States Code section 2254(d). That section provides that in a habeas corpus proceeding instituted in a federal court by a state prisoner, a determination after a hearing on the merits of the factual issue made by a state court of competent jurisdiction in which the applicant and the state were parties, shall be presumed to be correct if the federal court is satisfied that the petitioner had a fair opportunity to present his side of the issue in the state court, and that the procedure afforded him by the state was adequate to afford him a full and fair hearing. The legislative history of this section shows that it was intended by Congress to provide a qualified application of the doctrine of res judicata and create reasonable presumptions in federal habeas corpus cases where

state convictions were under collateral attack. See Cong. Record, Vol. 112, pp. 4887, 4895 (1966).

In the present case, the district court in addition to hearing testimony on the issue of voluntariness, reviewed the record of petitioner's trial and the opinion of the Supreme Court of California (TR 213-214). Such review convinced the district court that the Supreme Court of California gave careful consideration to all claims of error advanced by petitioner, including his claim of involuntariness, and that for the reasons stated in the opinion they were found without merit. Since the district court found no deficiencies in the state fact-finding process, the presumption of correctness provided in section 2254(d) applied to the state finding of voluntariness. Clearly that presumption was in no way vitiated when the district court, out of solicitude for the rights of the appellant, exercised its discretion to hold an evidentiary hearing and reached a conclusion identical to that reached in the state courts.

Thus, the question presently before the court is whether there is any legal reason why, as the United States Supreme Court did in Davis v. North Carolina, 384 U.S. 737 (1966), this Court should hold appellant's extrajudicial statement involuntary as a matter of law.

We respectfully submit that there is none. Although petitioner cites Bram v. United States, 168 U.S. 532 (1897) for the proposition that confronting a suspect with the accusations of his accomplice is inherently coercive he correctly notes that this theory has been superseded by at least two more recent decisions of the Supreme Court. See Stein v. New York, 346 U.S. 156 (1953) overruled on another point in Jackson v. Denno, 378 U.S. 368 (1964); and Cicenia v. Lagay, 357 U.S. 504 (1958), overruled as to another point in Miranda v. Arizona, 384 U.S. 436 (1966). In fact, however, the rationale of Bram seems to be that under the circumstances present in that case the very process of putting questions to the defendant was inherently coercive because the circumstances suggested to the defendant that he was required to answer. This rationale has been squarely rejected by the Supreme Court.

" . . . [T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of

cases, this Court had held that the Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive." Culombe v. Connecticut, 367 U.S. 568, 589-591 (1961). (Footnotes omitted).

For purposes of this proceeding, we think the best argument that we could make in answer to appellant's claim of psychological coercion has already been made by the district court. After carefully reviewing the record of the state trial and the opinion of the Supreme Court of California, hearing the testimony of witnesses, examining the exhibits, and finally listening to approximately ten hours of tape recordings, that court prepared a thoroughgoing opinion which we submit so convincingly answers petitioner's claim of psychological coercion that we can do no more than submit it to this Court as our argument on the issue. Therefore, we respectfully incorporate by reference as our argument on the point the appended opinion of the district court and we urge this Court to follow it.

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II

NO PREJUDICE TO APPELLANT RESULTED FROM THE INCIDENTAL COMMENT ON HIS FAILURE TO PARTICIPATE IN A RE-ENACTMENT OF THE CRIME

As noted in the opinion of the district court, as well as that of the Supreme Court of California, on the day after petitioner made the extrajudicial statement that he had been at Alum Rock Park on the night of the murder, the investigating officers took him along with Billy Still, his accomplice where Still re-enacted his part in the crime (RTST 725-732).^{4/} Still was eager to cooperate with the officers and re-enacted his portion in the crime (RTST 698). Appellant on the other hand, after commencing to act out his part, refused to cooperate in the re-enactment and then refused and told Still that he did not have to do anything either (RTST 801). Petitioner now characterizes this incident as "a mute participation," although that term is a misnomer. Actually, appellant's conduct was a refusal to participate. Before the district court and here on appeal, petitioner characterizes this as a coerced admission by silence and further states that at the trial the

4. "RTST" refers to the reporter's transcript of the state trial introduced in evidence before the district court, Docket Entry 22.

prosecution introduced this "mute participation" into evidence and argued therefrom that petitioner's silence in the face of such accusations constituted in effect an admission that the accusations were undeniable.

We think that the district court effectively answered this argument by stating as follows in its opinion:

"A thorough examination of the trial transcript reveals no place where anyone argued that petitioner's silence or refusal to participate should raise an inference of any kind of admission. Petitioner was not cross examined on this point. There are only two places in the prosecution's argument where the incident was even referred to. The first time, p. 1514 of the trial transcript, the reference was tangential to a point about the general consistency of Billy Still's various statements. The second time, at page 1544 of the trial transcript, the reference was in connection with the series of inconsistencies in the statements of petitioner Mathis. No objection was made by petitioner's counsel either time, and this Court finds no prejudice

whatever to petitioner in either of the references during argument or when these facts were first adduced." (TR 223).

Moreover, it should also be noted that if there has been an argument to the effect that Mathis' silence, when he was obviously standing on his rights, was to be taken as an admission of guilt such argument would have been clearly erroneous under California law. See People v. Simmons, 28 Cal.2d 699 (1946). However, the testimony was elicited and the passing comments made without any objection on petitioner's behalf. When he failed to object at the trial, he bypassed a readily available state remedy and therefore is now in no position to complain of the point on federal habeas corpus. See Nelson v. People, 346 F.2d 73 (9th Cir. 1965).

III

THE DISTRICT COURT WAS NOT REQUIRED TO APPLY THE ESCOBEDO RULE TO PETITIONER

Appellant's final contention is that despite the clear holding to the contrary in Johnson v. New Jersey, 384 U.S. 719 (1966), the Escobedo rule applies to his case. His argument, while not easy to follow, seems to be that because the California Supreme Court applied the Escobedo test, it therefore did not consider the coercion issue and petitioner did not receive a fair

appeal. There are several answers to this argument but the one that comes most readily to hand is that this Court is not sitting in review of the decision of the Supreme Court of California on petitioner's state court appeal, although as we have noted earlier, that decision is entitled to a strong presumption of correctness. The subject of this appeal is the decision of the district court after an evidentiary hearing in which the issue of voluntariness was thoroughly litigated.

Secondly, despite appellant's contentions to the contrary, the Supreme Court of California did review the voluntariness of the aspect of the case and stated that "an examination of the record discloses no question of that nature present." People v. Mathis, supra, 63 Cal.2d at 431, n. 7. (TR 96).

In any event the most dispositive answer to petitioner's contention is that the United States Supreme Court is the final arbiter of the scope of a newly announced constitutional rule. That Court has unequivocally declared that the Escobedo rule does not apply to cases that went to trial prior to the date of that decision.

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CONCLUSION

We respectfully submit that the order of the district court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: April 22, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General


ROBERT R. GRANUCCI
Deputy Attorney General

RRG:pp

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66-1812A

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: April 22, 1968

A handwritten signature in cursive script, reading "Robert R. Granucci".

ROBERT R. GRANUCCI
Deputy Attorney General

E X H I B I T

66-1812
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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DOVIE CARL MATHIS,)	
)	
Petitioner,	)	Case No. 46059
)	
vs.	)	ORDER DENYING WRIT OF HABEAS
	)	CORPUS, DISCHARGING STAY OF
LAWRENCE E. WILSON, Warden,	)	EXECUTION HERETOFORE GRANTED
California State Prison,	)	AND ORDER FURTHER STAYING
San Quentin, California,	)	<u>EXECUTION.</u>
)	
Respondent.)	

This is a petition for a writ of habeas corpus. Petitioner is incarcerated by the State of California pursuant to jury verdicts finding petitioner guilty of murder in the first degree and robbery in the first degree, and fixing the penalty at death. An order to show cause was issued, the execution of petitioner's death sentence was stayed, petitioner was appointed counsel, and a full evidentiary hearing was held, at which petitioner was present and testified.

EXHIBIT A

^P The crime of which petitioner was convicted took place around 1:30 a.m. on October 20, 1963. Petitioner was arrested at about 3:00 p.m. that same day. After being arrested he was taken to the San Mateo County jail in Redwood City, and questioned by the San Jose police for about half an hour. Petitioner at this time told police that he had been home all night and knew nothing about the crime. About 6:00 p.m. he was taken from Redwood City to the San Jose Police Station, and from 7:00 p.m. to 11:00 p.m. he was questioned further. His story that he had been home all night did not change. At 11:00 p.m. he was taken to the Santa Clara City Jail, and was left alone until 8:00 a.m. the next morning, Monday, October 20, 1963. At this time he was taken back to the San Jose police department and questioned further. All morning he stuck to his alibi that he had been home all night.

Sometime after noon petitioner changed his story, and at 2:45 p.m. he made a formal statement to the police which was transcribed on a recording disc with his knowledge. In this statement he retracted his first story and admitted being at the scene of the crime at the time of the crime, but said that he was not responsible for the murder and gave an elaborate explanation about what happened. At trial petitioner took the stand and told a third story regarding the events which took place at the scene of the crime and repudiated many of the points set forth in the statement referred to above. The statement was introduced at trial and the disc recording played to the jurors for the purpose of putting petitioner at the scene of the crime and as evidence of

prior inconsistent statements.

Petitioner's contention and ground for relief in this Court is that the 2:45 p.m. statement was not given to the police voluntarily, and that when this statement was used against him at trial, petitioner's right to be protected against self-incrimination was violated.

Petitioner alleges that he suffered a series of personal and physical acts of abuse from the police while in their custody. He alleges that at the time he agreed to give the statement he was in a weakened condition and suffering from lack of food, the influence of alcohol, fatigue, pain from wounds suffered the day before, more pain from the extraction of a sample of blood and the extraction by the police of several hairs from his head by the roots on the evening of October 20. He alleges that he was not permitted to contact a lawyer, and was subjected to debilitating police interrogation methods by physically and mentally superior police officers.

Petitioner alleges that the abusive treatment and the forceful interrogation coerced him, in his weakened condition, into giving the 2:45 p.m. statement involuntarily.

Petitioner's conviction was appealed before the Supreme Court of the State of California. In its opinion affirming the conviction and sentence, the Court referred to the involuntary confession issue now before this Court as follows:

Although appellant has alluded to the additional issue of voluntariness, an examination of the record discloses no question of that nature present. Voir dire examination of the interrogators

revealed no instances of mistreatment with the possible exception of the medical attention given to appellant's thumb. However, appellant never complained that the pain caused by that injury prompted him to give the statement. Additionally, appellant had been in custody for only 24 hours when he made the statement and had been allowed eight or more hours of sleep." People v. Mathis, 63 Cal.2d 416, 406 P.2d 65, 46 Cal. Rptr. 785 (1965), 46 Cal. Rptr. at 794 f.7.

It is evident from the above quotation and the remainder of the opinion, that the Supreme Court of the State of California gave careful consideration to all claims of error advanced by petitioner, and for reasons stated therein found them to be without merit.

However in view of the nature of the claims raised and the existence of pertinent United States Supreme Court case law which has succeeded the conviction and appeal in the California courts, this Court ordered an evidentiary hearing and has reviewed the record of this case in its entirety in reaching its own conclusions.

One issue in this case, the distinction between the prejudice caused by an exculpatory statement versus an inculpatory statement, has been determined in Miranda v. Arizona, 384 U.S. 436 (1966). In that case the Supreme Court ruled that such a distinction between the two can no longer be made. Accordingly this Court will treat the 2:45 p.m. statement as being clearly incriminating.

During the entire time petitioner was being questioned in the interrogation room at the San Jose police department on October 20 and October 21, the conversations between petitioner and police were being tape recorded, and these recordings were admitted into evidence at the evidentiary hearing before this Court (Exhibits 1 through 6). This Court has listened to all of the recordings prior to and during the time the 2:45 p.m.

statement was taken from petitioner, and most of the remaining tapes introduced. The accuracy of the tapes is not disputed.

With regard to the allegations of abusive treatment and weakened condition, this Court finds as follows: Petitioner was fed only one sandwich between the time of his arrest and his 2:45 statement. He was given this sandwich around noon on October 21. Other than petitioner's testimony there was no evidence that the lack of food could be attributed to an attempt of the police to starve petitioner. There was never a time anywhere on the tapes when petitioner asked for food. Nor on the tapes was there ever a time when the police withheld food on the condition that petitioner make a statement. There was evidence that on the morning of the 21st of October petitioner was offered breakfast at the city jail. Several places on the tapes petitioner while referring to his activities after he had arisen from bed on Sunday morning, October 20, stated that he never ate breakfast; this would account for his refusal to eat breakfast on October 21.

Petitioner's allegation that he was inebriated is not born out by the evidence. At 9:10 p.m. on the evening of October 20, a sample of blood was taken from petitioner. When analyzed this blood showed an alcohol content of .02%. See p. 501 and p. 554 of the trial transcript. Thus whatever petitioner's condition when he was arrested, by the morning of October 21 he could not have been suffering from the effects of alcohol. Even on Sunday evening the tapes indicate that petitioner's elocution was not hampered at all, and he never wavered regarding the details of his story. Thus whatever the state of petitioner's mind shortly before his 2:45 p.m. statement, it was not the result of alcohol.

Petitioner was without the benefit of advice of any lawyer during the entire period of his interrogation. The tapes have recorded two separate occasions on which he sought the opportunity to talk to his lawyer. On the first the police refused. On the second, which occurred just before petitioner gave his 2:45 p.m. statement, the police officer who had been interrogating petitioner telephoned the office of petitioner's lawyer but was unable to reach the lawyer. Petitioner alleges that he made many more requests to see his lawyer outside the interrogation room and earshot of the tape recorder.

Petitioner's trial began on April 21, 1964 before both Escobedo v. Illinois, 378 U.S. 478 (June 22, 1964) and Miranda v. Arizona, 384 U.S. 436 (June 13, 1966). Thus under the rule established in Johnson v. New Jersey, 384 U.S. 719 (1966), the constitutional right to have a lawyer when police exercise custody over a person and the right to be informed of this do not apply retroactively to petitioner Mathis. On the other hand the lack of counsel during police interrogation is an important factor to be considered in deciding whether a given statement has been coerced. Davis v. North Carolina, 384 U.S. 737 (1966). Thus the issue before the Court in this connection is the extent to which petitioner's lack of counsel had a coercive effect in producing petitioner's 2:45 p.m. statement.

Two facts tend to refute petitioner's allegation that the lack of a lawyer infected the voluntariness of his statement. On the evening of the 21st, petitioner and two other men agreed to make a jointly recorded statement of their conflicting versions of what

happened. At the time of this jointly recorded statement petitioner referred to his request to talk to his lawyer just before making the 2:45 p.m. statement, and said that before he had given the 2:45 p.m. statement he had asked for his lawyer, but thereafter had decided to give the statement anyway. The comment says by itself what can be gleaned from listening to the tape. Petitioner was putting together a story which would save him from a murder charge. Not to insist on talking to his lawyer might make the statement more believable. But the correlary inference is that giving the statement was not tied to the lack of presence of counsel.

It may be assumed that had a lawyer visited petitioner before he gave his 2:45 p.m. statement and the usual "don't say anything" advice were given, the statement would not have been elicited. However, prior to the Escobedo decision, supra, police were not required to permit a suspect to see a lawyer when he was arrested. The fact that a prompt summoning of counsel would have saved petitioner from making the 2:45 p.m. statement is not proof that the lack of a lawyer subjected petitioner to coercion. As discussed below, it is the opinion of this Court that petitioner was induced to make the statement from an entirely different circumstance.

Petitioner's allegations regarding pain and suffering from various wounds and police extractions of blood and hair are completely without basis. Petitioner's thumb was injured and given limited treatment. Petitioner was stripped and police looked over his body for any other signs of a scuffle, but found none. Police

were unable to detect any of the alleged gashes on the head and leg and chest at a time when they were energetically searching for this type of a clue. Petitioner registered no complaint regarding this pain to the police on the tapes, but arguably this could be explained by his attempts to avoid being placed at the scene of any altercation. This Court finds that the injuries to the head, the back, and the leg, if they did exist, were minor and were not debilitating, and as such could not have contributed significantly to petitioner's alleged fear, fatigue and confusion.

The police did admit that on Sunday evening they took a sample of blood from petitioner and that they pulled several hairs from his head by the roots. Petitioner had given permission to the police to take these samples, and he never complained on the tapes regarding the taking of these samples. Whatever pain petitioner suffered on these occasions was temporary and did not persist to the next morning.

With regard to the interrogation by police, petitioner alleges that, "Throughout the interrogation, the police used every method available to them, short of outright violence, to coerce the petitioner into making the statements he ultimately made. The police frightened him, tired him, and verbally abused him throughout the interrogation period." It is clear from the tapes that the questions asked by police were directed towards getting a statement which incorporated some of the evidence they had against petitioner. However until his 2:45 p.m. statement petitioner did not change his alibi that he was home all night and that his thumb was smashed in a car door.

The questions asked by police were not asked in a confusing manner or in a heated or vengeful manner. The questions and answers centered on the subject of exactly what petitioner had been doing and where he had gone all day Saturday, October 19 and Sunday, October 20. Much of the time was spent hashing through petty details. A constant subject of the questioning was a hat found near the murdered man's body, which police suspected belonged to petitioner. The explanation given by petitioner for the injury to his thumb was gone over by police time and time again. Petitioner was also repeatedly questioned regarding the source of some money he was supposed to have given a woman with whom he had been living. It is clear that the police were attempting to break down petitioner's first story and to trap him into self-contradiction.

Petitioner alleges that he was induced to make the 2:45 p.m. statement by promises that he would be charged with a lesser crime than murder if he made a statement. The tapes do show that the police were attempting to obtain from him a statement admitting that he had some connection with the crime. The method used was to suggest that if there were some self-defense aspect to the incident, the charge could be less than first degree murder, but that on the basis of the information they had at that time (that petitioner had lured the victim, known to carry a large amount of cash, to a secluded area) the charge would be murder under the felony murder rule. However, what was said by the police never amounted to a promise of any kind. The statements of the police were essentially informative.

In addition, petitioner never responded to these alleged promises. As discussed below, the statement given by petitioner did not incorporate the idea of self-defense, but placed the blame for the murder on some other person. The statement was responsive to the information that a cohort of petitioner's had been arrested and had confessed and directly implicated petitioner.

Petitioner alleges also he felt threatened with bodily harm and intimidated by the police deprivation of continually calling him "nigger". The tapes do not substantiate either of these charges. The police denied these allegations, specifically. This Court finds that petitioner's testimony in support of these allegations was completely untrue.

Petitioner alleges that police used threats against Kathy Taylor, the girl with whom he was living at that time, to wear down his resistance. There were many references to Miss Taylor, but in many different contexts, only one of which included the possibility that she might be involved in the crime. This Court finds that neither the relation between petitioner and this woman, nor the particular reference to her were such as to in any way affect the voluntariness of petitioner's statement. This Court finds that petitioner's allegation and testimony that his statement was connected with concern for the well-being of Kathy Taylor are a complete falsehood.

Respondent does not deny that during the twenty-four hour period preceeding the 2:45 p.m. statement, petitioner had no contact with the world outside of police departments and jails, although they allege that he had

permission to make any call he wanted Sunday night when he was booked at the city jail. It is likely that this fact and the extensive interrogation did have some effect on petitioner. However, in the opinion of this Court the effect was not such that it coerced the 2:45 p.m. statement out of petitioner.

The remaining question on the involuntary statement issue is whether petitioner's mental and physical condition was such that the eleven hours of interrogation coerced the 2:45 p.m. statement. In this regard, the Court finds it significant that the statement was given to police shortly after they had confronted petitioner with the news that they had arrested Billy Still and that Still had given them a statement admitting participation in the crime and directly implicating petitioner. Petitioner also learned that Still had given police many details of the pair's activities which police could readily check out.

Furthermore, when petitioner did give the 2:45 p.m. statement, he did not simply "spill his guts" but presented police with a carefully contrived story which was intended to be a complete defense to any prosecution for murder and most of which he repudiated at trial as not being true.

All during the interrogation on the morning before he gave the statement, petitioner had parried the police questions firmly, quietly, patiently, and with thorough consistency.

In addition, contrary to petitioner's testimony, the tapes show that he was told by the police, albeit informally, of his right to remain silent several

times before making his 2:45 p.m. statement.

In addition the eleven hours of questioning was not uninterrupted. At different times petitioner was left alone in the interrogation room for periods of 5 to 15 minutes.

Accordingly it is the finding of this Court that the most important factor in causing petitioner to make the 2:45 p.m. statement to police was the confronting him with Billy Still's statement. It is also the finding of this Court that at the time petitioner gave up his first alibi, he was not suffering from unusual fatigue or any confused state of mind. Petitioner gave his statement freely, voluntarily, and without compulsion or inducement of any sort.

Petitioner cites Haynes v. Washington, 373 U.S. 503 (1963) as a case almost identical on its facts with the present one and in which a confession was held to be involuntary. With regard to the facts recited by the United States Supreme Court one significant distinction is that the recital of voluntariness contained in the confession was infected with the promise of the police to let Haynes call his wife, in effect, only after Haynes gave police a statement. Here the recital of voluntariness in the 2:45 p.m. statement contains no such limitation, and on the tape the recital is spoken in a positive, convincing manner. Most significant in rejecting petitioner's comparison of the Haynes case, supra, is the picture this Court, after a careful review of the entire record, has gleaned of petitioner as being quite able to maintain complete control over what he would say and of his right to say nothing during the entire period of police interrogation.

Petitioner has raised one additional issue. During petitioner's trial it was brought out on direct examination of a police officer that petitioner had stood mute and refused to participate in the reenactment of the crime at the scene of the crime. The police initiated the idea of the reenactment, and had obtained Billy Still's cooperation. Petitioner alleges that the prosecution improperly attempted to draw an inference of an admission of guilt from petitioner's silence in the face of the accusations which were inherent in the reenactment by Billy Still and the police's attempt to gain petitioner's cooperation.

A thorough examination of the trial transcript reveals no place where anyone argued that petitioner's silence or refusal to participate should raise an inference of any kind of admission. Petitioner was not cross examined on this point. There are only two places in the prosecution's argument where the incident was even referred to. The first time, p. 1514 of the trial transcript, the reference was tangential to a point about the general consistency of Billy Still's various statements. The second time, at page 1544 of the trial transcript, the reference was in connection with the series of inconsistencies in the statements of petitioner Mathis. No objection was made by petitioner's counsel either time, and this Court finds no prejudice whatever to petitioner in either of the references during argument or when these facts were first adduced.)

In view of the above it is ordered that this petition for a writ of habeas corpus must be and hereby is DENIED.

Further, it is hereby ordered that the stay of execution previously ordered by this Court on December 13, 1966 is hereby DISCHARGED.

Further, it is hereby ordered that the above order discharging the stay of execution is stayed for a period of sixty days so that petitioner, if he is so advised, may have time to appeal this order or to initiate further proceedings in this matter.

Dated: September 20 1967

ALB. T. C. HOLLAND
United States District Judge

No. 22470 ✓

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANT CONSTRUCTION COMPANY,

Appellant,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON
& NORTHWEST UNDERWRITERS,

Appellee.

FILED

APR 23 1968

W. B. LUCK, CLERK

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO
NORTHERN DIVISION

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STATEMENT OF PLEADINGS AND JURISDICTION

This is a civil action by Grant Construction Company, plaintiff-appellant, to recover from Underwriter's at Lloyd's London and Northwest Underwriters, defendants-appellees, the sum of \$100,000.00 under the provisions of a policy of personal accident insurance issued by said defendants, together with attorney's fee and costs. The insured, now deceased, was Joseph W. Grant and plaintiff-appellant, Grant Construction Company, is the named beneficiary under the policy.

This action was commenced in the United States District Court for the District of Idaho, Northern Division, by complaint filed February 10, 1965. (R.5) The defendants appeared in the action by filing an answer. (R.17)

An agreed stipulation of facts was filed. (R.22) The cause was tried by the Court sitting without a jury and a judgment in favor of defendant was entered August 30, 1967. (R.60)

The jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, United States Code Annotated, Sec. 1332.

The jurisdiction of this Court to review this case arises under Title 28, United States Code Annotated, Secs. 1291-1294, this being a final decision and judgment of a District Court from which an appeal may be taken.

STATEMENT OF THE CASE

Prior to the trial of this action, the parties, through their respective attorneys of record, entered into a written stipulation regarding some of the facts (R.22) involved in the case. The stipulated facts are:

Northwest Underwriters, acting for and on behalf of Lloyd's of London, through McGovern-Carroll Company, agency of Spokane, Washington, did, on the 10th day of May, 1962, for a premium paid, insure Joseph W. Grant under Certificate of Insurance LNWT No. 102798 for the sum of \$100,000.00 against accidental bodily injury, according to the terms and conditions of that policy; with Grant Construction Company as beneficiary.

Joseph W. Grant died on the 18th day of June, 1962.

The autopsy finding of Dr. Alberto M. Barrera, the local coroner, were as follows:

"Autopsy findings in this case of the late Mr. Joseph William Grant, 65 year old adult male. Time of the death about 2:30 P.M., June 18, 1962. Death was due to acute coronary obstruction by infarctus of the right descending branch of the coronary artery of the heart. Death was more or less instantaneous.

"Signed at Kaslo, B.C., June 19, 1962."

In addition to the foregoing stipulated facts the evidence established that on the day of his death, Joseph W. Grant and his wife were fishing on Kootenai Lake, British Columbia, Dominion of Canada, in a sixteen-foot fiberglass boat. The boat was powered by a 45 horsepower Mercury motor with a 10 horsepower auxiliary motor. The weight of the boat and motors was 1500 pounds. Mrs. Grant weighed 125 pounds.

While they were fishing a sudden storm condition developed with high winds and rough water which caused them to fear that their boat might capsize. Neither the deceased nor his wife could swim. Deceased became emotionally upset, nervous and distressed and he undertook to beach the boat. The shoreline was extremely jagged and steep. Mr. Grant drove the boat as near to the shoreline as water depth permitted and then crawled out of the boat into the water and with a rope tugged and pulled on the boat in an attempt to lodge it onto the shoreline.

Considerable time was spent by deceased, both in and out of the cold water, in an attempt to lodge and secure the boat against the storm. The action of the water and the winds was such as to cause the boat to be thrown against the rocks located along the shoreline threatening to destroy the boat.

After repeated strenuous efforts and much exertion in attempting to lodge and secure the boat he became very pale and appeared to

be gasping for breath. Upon reaching the boat he slumped into the boat in an unconscious condition and he died very shortly thereafter. His body was returned to Kaslo, British Columbia where an autopsy was performed, the results of which are stated in the foregoing stipulated facts.

SPECIFICATIONS OF ERROR

- (1) The Court erred in its interpretation and construction of the insurance contract to the prejudice of plaintiff.
- (2) The Court erred in concluding that the death of insured, although accidental, was not an accidental death within the coverage provided by the insurance contract.
- (3) The evidence does not support a conclusion that the pre-existing condition of the insured was a material contributing cause of his death.
- (4) The Court erred in concluding that the evidence is insufficient to sustain a finding of death from physical exhaustion.
- (5) The Court erred in entering judgment for the defendant and denying plaintiff the right to recover the amount provided under the insurance contract.

ARGUMENT

SPECIFICATIONS OF ERROR # 1 and # 2

Having determined that the death here involved was accidental the trial court necessarily applied an erroneous interpretation and construction upon the insurance contract in order to defeat appellants' claim.

The pertinent portions of the insuring clauses contained in the policy here involved are as follows:

"INSURING CLAUSE: If at any time during the currency of this Certificate the Assured shall sustain any accidental bodily injury which shall, solely and independently of any other cause within twelve (12) calendar months from the date of the accident causing such bodily injury, occasion the disablement of the Assured as herein-after defined and a claim be substantiated under this Certificate, the Underwriters will pay to the Assured, his Executors, Administrators or Assigns (or in case such bodily injury shall occasion the death of the Assured, to the Beneficiary or Beneficiaries named herein) according to the schedule of Compensation herein specified within thirty (30) days after satisfactory proof of death or disablement to the Underwriters."

The policy also contains a list of definitions of some of the language used in said insuring clause among which is the following:

"DEFINITIONS: It is understood and agreed that:
'2. Bodily Injury Which Shall Occasion Death' includes, in addition to the coverage herein provided, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation."
(underscoring supplied)

The exclusionary language contained in the policy reads, so far as pertinent, as follows:

"1. EXCLUSIONS: This Certificate does not cover death, injury or dismemberment:
"(a) . . .
"(b) Directly or indirectly caused or contributed to by . . . disease or natural causes . . ."

The foregoing quoted provisions of this policy fix the insuring liability of appellee. The language used therein is of appellee's choosing, and we believe it to be a generally recognized rule that the construction to be placed upon it should be most favorable to the insured and least favorable to the author of the policy. *Watkins v. Federal Life Ins. Co.*, 54 Ida. 174, 29 P.2d 1007; *O'Neil v. New York Life Ins. Co.*, 65 Ida. 722, 152 P.2d 707; *Finley v. Prudential Life & Casualty Ins. Co. (Ore.)*, 388 P.2d 21.

The trial court in its "Memorandum Opinion" which constitutes the Findings of Fact and Conclusion of Law of the trial court (R.59) stated that "the Court is therefore bound to apply the substantive law of Idaho so far as the same may be ascertained." The Court also stated that "Idaho has regularly construed insuring clauses favorably to the insured." We agree with the foregoing quoted statements of the Court.

We also agree with the following quoted definition and statement regarding "an accident" as contained in the Court's opinion, to-wit:

"Where the result of an act was not natural and probable and should not reasonably, under all the circumstances, have been foreseen, and is tragically out of proportion to a trivial cause, it is an accident in this jurisdiction within the meaning of this policy. O'Neil v. New York Life Ins. Co., 65 Ida. 722, 152 P.2d 707 (1944). That the act of the decedent was voluntary or deliberate does not change this result. Rauert v. Loyal Protective Ins. Co., 61 Ida. 677, 106 P.2d 1015 (1940)."

The trial court specifically found that "certainly Mr. Grant's death was unforeseen and unexpected" and concluded that under the facts and the Idaho law, the death here involved was "accidental". (R. 6 & 9) Notwithstanding the finding that the death was accidental recovery was denied because the Court concluded that the death was contributed to by the pre-existing diseased condition of the insured.

It is our contention that the Court, in arriving at the conclusion that appellant was not entitled to judgment erred in interpreting both the provisions of the policy and the evidence. We shall first discuss the policy coverage and later, in this brief, discuss the insufficiency of the evidence.

We believe that the more recent decisions of the Appellate Courts throughout our land interpreting risk exclusion clauses similar to the one here involved, are not strictly in accord with earlier decisions. We consider the case of Brooks v. Metropolitan Life Ins. Co. (Cal. 1945) 163 P.2d 689 to be a recent well considered and influential case. It dealt with an insurance policy containing very similar provisions to ones involved in this case. The policy insured Brooks 'against the results of bodily injuries . . . caused directly and independently of all other causes by violent and accidental means." The policy further provided that it shall not cover "accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or mental infirmity or medical or surgical treatment therefor." The insured was suffering from incurable cancer of long duration and died in a fire which started in his bedroom. The Court in sustaining an order granting a new trial at the request of defendant, stated:

"...that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause."

"Although it appears that the insured was suffering from an incurable cancer and was under the influence of narcotics given to relieve pain, and that by reason of his weakened and infirm condition he may have been less able than a normal person to withstand the effect of the injuries, there is evidence from which the court could conclude that the proximate cause of his death was burns received in a fire of accidental origin."

In a later California case entitled Stokes v. Police and Fireman's Ins. Ass'n, 243 P.2d 144 the Court had under consideration a policy providing for payment where "death is caused by external, violent and accidental means, independent of all other causes".

The Court, on rehearing, stated:

"It is our opinion that it is now the settled law of this state since the Brooks decision that a recovery may be had under the provisions of a policy providing for payment where 'death is caused by external, violent and accidental means, independent of all other causes' and 'excluding payment where death is caused wholly or in part by disease' if the accident is the proximate cause

and sets in motion a chain of events leading directly to death, and notwithstanding the fact that a pre-existing disease contributed to the death. Since the court here found as a fact that the accident was the prime and moving cause of death (the pre-existing heart disease only contributing) it cannot be said as a matter of law, in interpreting the provisions of the policy and the evidence, that the death of Stokes was caused in whole or in part by any pre-existing heart disease. As stated above, counsel in the Brooks and Happoldt cases endeavored to avoid liability on the same grounds as appellant here; namely, that death was not caused by the accident, independent of all other causes, but was caused in part by a pre-existing heart disease." (citing cases)

In this connection we call attention to the decision in Graham v. Police & Firemen's Ins. Ass'n. (Wash.), 116 P.2d 352, wherein the court thoroughly considered and discussed the effect of physical infirmity of insured at the time of accident. In this case the policy provided for payment to the beneficiary in the event the insured died "through external, violent and accidental means independent of all other causes." Insured fell and injured himself while undertaking to rescue his daughter from a fire and died approximately 10 days later. He was 59 years of age and had suffered from angina pectoris. The following are excerpts from the court's opinion:

"It is true that the insured had a disease of the heart which had manifested itself on more than one occasion. That alone, however, will not prevent a recovery on the

policy."

"The weight of the authorities and the decided trend of modern authority is to the effect that, where disease merely contributes to the death or accident, it is not the proximate cause of the death or injury, nor a contributing cause, within the meaning of the terms of the policy.' Kearney v. Washington National Insurance Co., 184 Wash. 579, 52 P.2d 903, 904.

"In order to recover under a policy such as we have before us, the law does not require that a person must be in perfect health at the time an accident occurs. Pierce v. Pacific Mutual Life Ins. Co., Wash., 109 P.2d 322.

"If it were otherwise, an accident policy such as the one under consideration would be of no value after the insured had contracted some disease regardless of the fact that premiums had been paid for many years. Such cannot be the intent of the contract. It is only necessary for the evidence to disclose that the accident was a direct and proximate cause of the death and that the proximate cause is' *** that which sets in motion a train of events bringing about a result without the intervention of any force operating or working actively from a new and independent source.' Pierce v. Pacific Mut. Life Ins. Co., supra. (citing cases)

"The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause. In such case, disease and low vitality do not rise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury. Driskell v. United States Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S.W. 880, 882."

In Shafer v. American Casualty Company 53 Cal. Reprtr. 446, decided September 19, 1966, the Court considered facts very similar to those in the instant case. The policy covered death resulting "directly and independently of all other causes from bodily injury . . and effected solely through accidental means, . . ." coverage for "disease" is expressly excluded.

The insured was involved in an automobile accident as a result of which he sustained a bruise on his arm and shock. At the time of the accident the insured had a serious condition of arteriosclerosis in his coronary arteries and he also had a greatly enlarged heart. He died two days after the accident from a heart attack caused by coronary thrombosis. The court found that the coronary thrombosis which resulted in the death was caused by a concurrence of two things; (1) the shock sustained in the accident and (2) the diseased condition which decedent had at the time of the accident.

The Court found that if the pre-existing condition of arteriosclerosis and an enlarged heart did not exist, the accident alone would not have caused the coronary thrombosis from which the insured died. However, the Court did find that "the accident was the prime or moving cause which resulted in bodily injury which acted upon the pre-existing condition of the deceased, so as to complete a chain of events which led to coronary thrombosis and thus to his death." Judgment for plaintiff

was affirmed.

In this case the Court cites and quotes from many cases, including the leading California cases involving insurance contracts of the kind we are dealing with in this instant case.

The effect of pre-existing bodily infirmities was considered by a Federal Court in Scanlan v. Metropolitan Life Ins. Co. 93 F. 2d 942 (C.C.A. 7th) wherein the insurance policy involved provided:

"CLAUSE 9. This insurance shall not. . . cover accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity . . . "

The insured suffered several broken ribs and a large bruise on his left leg as the result of an automobile accident. The bruise was in the area where he was and had been afflicted with varicose veins. His death occurred 15 days after the accident and was caused by the breaking off of part of a blood clot in the leg, which then passed through his veins to the heart and ultimately to his lungs where it became lodged. The trial Court found that "there was only a possibility of a thrombus occurring in the varicose vein in the absence of the injuries sustained." The Court stated that the precise question presented is "Was Scanlon's death caused partially by his bodily infirmity?" In considering the question the Court said:

"While the bodily infirmity need not be the sole cause of the death to defeat recovery under this policy, it is well settled that the 'cause' as here used, either sole or partial, refers to something different than a disease or affliction rendered more serious by the consequences of the accident.

"One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. If the infirmity alone would not have caused death, it cannot be said to have caused death when the immediate result was occasioned by an infirmity which became active only because of the accident. The infirmity may have made the insured less able to resist, but if the accident caused the condition which in turn affected the weak spot which did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded." (Citing cases)

In Life and Casualty Ins. Co. of Tenn. v. Jones 328 S. W. 2nd

118 (Ark. - 1959) the Supreme Court of Arkansas considered a case where the pre-existing bodily infirmities were considerably more severe than in the instant case and two insurance policies were involved. One of the policies contained the provision that it "does not cover death caused directly or indirectly from, or contributed to by bodily or mental infirmities or disease in any form" The second policy was an accident policy only and contained the following quoted provision, to-wit:

"Benefit for Death by Accidental Means -- If the insured, after the effective date of this policy, sustains drowning or bodily injury effected solely through violent, external and accidental means, and if such drowning or bodily injury is the direct, independent and proximate cause of the death of the insured *** and if such death is not caused or contributed to by disease or infirmity, the company will pay the sum specified ***."

"Exclusions, Reductions and Limitations: This policy does not cover death caused***directly or indirectly from, or contributed to by, bodily or mental infirmities or disease in any form***"

During an altercation insured was clubbed upon the head by a Coca-Cola bottle and died about one-half hour later. An autopsy was performed which listed the cause of death, "Coronary thrombosis and occlusion of the left anterior descending branch of left coronary, with myocardial infarction; severe generalized arteriosclerosis with severe coronary sclerosis; laceration of scalp with hemorrhage; hypertensive cardiac vascular disease, with terminal cardiac failure***."

Appellant claimed error because of the trial Court's refusal to give a requested instruction and direct a verdict for it.

The Court affirmed the judgment, finding no error in the trial Court's refusal to give Appellant's requested instruction and stated:

"Our exhaustive research reveals the law to be well settled in this state that an insurance company is liable on their policy of accident insurance if death resulted when it did on account

of an aggravation of a disease by accidental injury, even though death from the disease might have resulted at a later period regardless of the injury, on the theory that if death would not have occurred when it did but for the injury, the accident was the direct, independent and exclusive cause of death at the time." (Citing cases).

In Kievit v. Loyal Protective Life Ins. Co. 34 N.J. 475, 170 A.2d

22 the insured sustained injuries when he was struck by a "two by four" while on the job as a carpenter. Thereafter he developed tremors and became totally disabled. Judgment for defendant was appealed by plaintiff and the Supreme Court reversed the judgment.

The accident policy involved indemnified against loss resulting directly and independently of all other causes from accidental bodily injuries" and included an exclusionary clause which excluded loss "resulting from or contributed to by any disease or ailment."

The trial court found that insured's injury had been contributed to by his pre-existing condition known as Parkinson's disease.

In reversing the trial court, the Supreme Court of New Jersey stated:

"When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their

favor to the end that coverage is afforded
'to the full extent that any fair interpretation
will allow."

"Where particular provisions, if read literally,
would largely nullify the insurance, they will
be severely restricted so as to enable fair
fulfillment of the stated policy objective."

The issue in the case, the court stated was "whether the
plaintiff's disability resulted from accidental bodily injuries 'directly
and independently of all other causes' and was not 'contributed to by
any disease or ailment' within the fair purpose and meaning of the
defendant's policy."

The Court quoted Justice Hilton in Wolfangel v. Prudential
Ins. Co. of America, 209 Minn. 439, 296 N.W. 576 as follows:

"'Whenever a person is in any respect below
normal in health or bodily resistance, a strict
application of the doctrine that the accident must
be the sole and independent cause of the death
would probably always require a decision for the
insurer since it is seldom, from the medical
point of view, that one cause is solely responsi-
ble for death. Silverstein v. Metropolitan Life
Ins. Co., 254 N.Y. 81, 171 N.E. 914; 72 ALR
867. This consideration has persuaded several
courts to distinguish between legal and medical
causes and recovery is allowed wherever the
accident and its effects, acting upon an imperfect
state of health, can be said to have been the proxi-
mate cause of death.'" (citing cases)

We believe - that a well reasoned discussion of the correct
view which should be taken of a physical infirmity as concerns being a
contributing or concurring cause of death in an accident case is

presented in the Missouri case of Driksell v. United States Health & Acc. Co. 93 S.W. 880 wherein the court stated:

"People differ so widely in health, vitality, and ability to resist disease and injury that what may mean death to one man would be comparatively harmless to another, and, therefore, the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions: if under the particular temperament of condition of health of an individual upon whom it is inflicted which injury appears as the active efficient cause that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the sole and proximate cause of death. The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as a sole producing cause. In such a case, disease and low vitality do not rise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agency set in motion by the injury."

Many additional cases supporting a like view could be cited, however we shall conclude this portion of our argument by quoting an applicable general rule which is stated in 56 ALR 2d 816 as follows:

"There is seemingly general agreement on the proposition that if an unusual happening occurs in conjunction with exertion or exercise on the part of the insured, and this is followed by a

heart attack, recovery may (assuming causation is established) be had under a policy providing benefits for the results of 'accidental means', whether the unusual happening precipitated the exertion or occurred in the course of the same."

Under this general rule is cited the case of Commercial Travelers Ins. Co. v. Walsh (1955, CA 9th Wash.), 228 F2d 200, 56 ALR 2d 796, in which case the insured was unloading sacked wheat from his truck; one of the sacks, weighing about 140 lbs., started to fall; insured took one step forward, reached out and quickly grabbed the sack with one hand and held onto the building with his other hand holding the sack at a 45⁰ angle until his son could go around the truck and straighten the sack. Insured felt pain in his chest and died the next day as a result of a coronary occlusion. An autopsy showed a pre-existing heart condition. The U. S. Court of Appeals, 9th Circuit in affirming the trial court's decision that his death was caused by accident stated:

"However, the language used in what appellant contends is the leading Washington decision indicates that where the act of the insured is not 'deliberate', in the sense of being voluntarily done to accomplish a planned purpose, the reaction of the insured to danger should be considered part of the accident causing the coronary occlusion." (Emphasis added)

In the foregoing cited case some discussion is devoted to the effect of a deliberate act on the part of insured. No such deliberate act is involved in the instant case. This insured did not leave a place of shelter and safety to go into the storm exposure. The evidence shows that the storm suddenly developed and that insured was departing from a place where both he and his wife were in imminent danger of drowning and was endeavoring to make their way to relative safety.

SPECIFICATION OF ERROR #3

We sincerely contend that the evidence does not support a conclusion that the pre-existing physical infirmities of the insured were a direct, proximate or a concurring proximate cause of his death. Although the trial court did not find that the pre-existing physical infirmities of the insured constituted a direct or proximate cause of the death, the court did conclude that the evidence preponderated for the position that the death was contributed to by the pre-existing diseased condition of the insured.

It is evident from the "Memorandum Opinion" that the trial court considered that the insured's pre-existing physical infirmities consisted of two conditions, namely - arteriosclerosis and heart trouble.

We agree that the evidence is sufficient to support a finding that the insured had a pre-existing arteriosclerosis condition, but we do not agree that the evidence supports a conclusion that he had a "severe arteriosclerosis condition". The record (Tr.78) discloses that Dr. Stier (a witness called by defendants) "assumed" that insured had a severe degree of arteriosclerosis, notwithstanding the fact that the witness never knew the deceased, had never seen him either before or after his death, nor did the witness see or consult any record which described his condition as being "severe". Since arteriosclerosis is a hardening of the arteries and is a condition of the tissues developing gradually over a period of years we believe the witness was entitled to assume that deceased had a condition commensurate with the degree usually present in a person of comparable age, (64 years) and no more.

As concerns the evidence tending to show that insured had at some time experienced some heart trouble the record shows that insured's widow testified that "he had had heart trouble", however she was not asked as concerns how long before his death he had experienced any such trouble. The only other mention of heart trouble was a statement in his application for the insurance policy here involved wherein it was stated that he (insured) had, in about the year 1950, been turned down for insurance because of a suspected heart condition.

There is no evidence disclosing the extent or nature of any heart trouble he experienced during the years or months immediately preceding his death. In this connection we call attention to Mrs. Grant's testimony that "he went out and played golf all the time and went fishing and hunting."

Two doctors testified in this case and were asked a hypothetical question based upon the experiences of deceased during that day. Dr. Pearson unequivocally stated that in his opinion the death of deceased was brought about and caused by the exposure, strain and exertion, and was accidental. Dr. Stier, who was called by defendant, also stated it was his opinion that the exposure, strain and stress was the cause of death. The following are excerpts from Dr. Stier's testimony:

"Q In your opinion did this stress and strain have anything to do in regard to the fact that this thrombosis was then created as a result of this stress and strain?

A Ask that Again.

Q In your opinion was this thrombosis the result of this stress and strain?

A Yes."

When the doctor was asked if he put any credence or effect on the fact that death followed immediately after the exertion and strain he answered:

"A Certainly I put credence in it.
Q What credence do you put to that?
A The fact that the stress and strain probably
was the terminal event that caused the
thrombosis and, therefore, caused the
death." (Emphasis supplied)

Following some questioning regarding the effect of stress and strain in causing the thrombosis the doctor was asked:

"Q What about the emotional factors, Doctor?
What effect does that have upon a person?
A Same effect.
Q What about the two combined together?
A Very definite effect.
Q And together would the combination of these
two produce a thrombosis?
A Yes, sir.
Q And this would be sudden?
A Yes, sir.
Q And death would be instantaneous?
A It could be, yes.

* * *

Q You stated that these extreme conditions to
which this man was then being subjected to
were the contributing factors that caused
this thrombosis?
A Yes, sir."

Both doctors gave credence to the time proximity between the unusual exertion on the part of the deceased and his death. This is in keeping with the following quoted excerpt from Levine's third edition, Clinical Heart Disease which was read into this record, to-wit:

"The most important point in many of these cases is the time relation between the accident and the cardiac abnormality. If the exact status of the patient before the accident is known, it is reasonable to assume that new objective or subjective evidence of disability occurring within minutes, hours or several days is due to the accident."

We believe it to be significant in this case that no witness, either lay or expert, has expressed the belief or opinion that had it not been for the unusual stress and strain exerted by insured on that occasion he would have died on that day. In fact defendant's witness, Dr. Stier was asked "Now, Doctor, in your opinion assuming the weather had been clear and nice and this man hadn't exerted and pulled and tugged on the boat and hadn't done any of these events you had heretofore assumed, do you think that the man would have died with arteriosclerosis on that day?", to which the Dr. finally answered "I have no opinion".

In view of the foregoing mentioned evidence we contend that the Court should have found that the unusual stress and strain exerted by insured, which was accidentally brought on, was the prime and moving cause which acted upon the pre-existing condition of the deceased so as to complete a chain of events which led to the thrombosis and thus to his death. (see *Life & Casualty Ins. Co. of Tenn. v. Jones* - *supra*)

SPECIFICATION OF ERROR #4

We cannot agree with the trial court's conclusion that "there is insufficient evidence to sustain a finding of death from physical exhaustion".

In support of our position regarding the court's conclusion as above referred to we quote from the testimony of Mrs. Grant as she explained the struggle deceased went through in trying to find protection from the storm.

"Q What did Mr. Grant do at that time, Mrs. Grant?

A He--after he untied it--he went back and untied it and tried to push it off the rocks. Now in pushing it off, I looked at him and he was out of breath and pale and it looked like he was very tired, and he pushed it out off the rocks to the best of his ability, probably not clear off the rocks because he--well, he then tried to climb--after he had got it back off the rocks some, he climbed into the boat. He pulled himself off into the boat and fell face downward in the bottom of the boat."

SPECIFICATION OF ERROR #5

It is appellants sincere contention that since the trial court expressly found and concluded that the death of insured was in fact "accidental" and not having found that the pre-existing physical

condition was a direct or proximate cause of death. The Court erred in denying appellant a judgment as prayed for. We contend that the applicable rule of law is in substance that even though a disease, bodily infirmity, or predisposing cause exists at the time of the accident, it will not defeat recovery unless it is found to be a direct or proximate cause of death rather than a remote or contributing cause or condition.

In Equitable Life Assur. Soc. of U. S. v. Gratiot 14 P2d 438,

the Court stated:

"A policy of insurance should not, of course, be so strictly construed as to thwart the general object of the insurance. To do so would, in the long run, subserve the purposes neither of insurers nor insured. It can hardly be assumed, in the absence of a contract clearly to the contrary, that the parties to the contract meant to have the double indemnity, or any other provision for cases of accident, apply only in case the insured is in perfect health at the time of the accident."

"The foregoing case as a whole, or at least many of them, all dealing with policies similiar to that in the case at bar, clearly show, we think, that, in solving the problem before us, we cannot overlook the distinction between proximate and remote cause,

and that if a disease, bodily infirmity, or predisposing cause in fact existed, as claimed, still unless it can be said to be one of the proximate causes instead of only the remote cause or condition, recovery should not, on that account, be denied."

In the instant case the combination of events culminating in and causing the exertion and strain was accidental; the crises brought about by the storm was neither intentional or expected and the reaction of the insured to the danger that existed must be considered as part of the accident causing the acute coronary obstruction suffered by Mr. Grant.

CONCLUSION

The judgment should be reversed and judgment entered for plaintiff in the amount specified in the coverage provision of the policy.

The action should be returned to the trial court with direction to enter judgment for appellant in the amount of the coverage provision of the policy plus a reasonable attorney fee to be fixed by the trial court. It was stipulated (Tr. -64-65) that in the event there is recovery by the plaintiff the Court may fix the amount of attorney's fees to be allowed plaintiff, without the offer of evidence, in accordance with the statutes of the State of Idaho.

The Idaho Statute referred to is I.C. Sec. 41-1839 and the pertinent portion thereof, provides as follows:

"41-1839. ALLOWANCE OF ATTORNEY FEES IN SUITS AGAINST INSURERS. - (1) Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action."

Respectfully submitted,

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NO. 22470

UNITED STATES COURT OF APPEALS
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Appellant,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON
& NORTHWEST UNDERWRITERS,

Appellee.

FILED

MAY 1968

JAM B. LICK JURY

BRIEF OF APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO
NORTHERN DIVISION

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STATEMENT OF THE CASE

JOSEPH W. GRANT was the founder of what is known as the GRANT CONSTRUCTION COMPANY, a corporation, but because of "heart disease" he had retired from active management of the company although he had served as a consultant in connection with some of the corporate office work.

He spent considerable time fishing and was well equipped with a splendid launch adequately equipped with a traveling as well as a trolling outboard motor and trailer which he could hitch to his car and go from lake to lake.

On the occasion involved here, he and Mrs. GRANT went to Kootenay Lake, which is in British Columbia, Canada, and there launched the boat and motors and proceeded to fish on Kootenay Lake by trolling.

A sudden squal or windstorm came up and Mr. GRANT, who was accompanied by his wife (since deceased), concluded to pull out of the heavier water and into a more protected area and tied up to the shoreline; he had turned off the motors and tried to keep the boat from being battered against the shoreline because of the wave actions. Mr. GRANT got out and tied the boat up, got back into the boat and as he did, collapsed and died, apparently instantly.

She attempted resuscitation without success.

She then tried to attract the attention of other people who might be on the lake and also to protect the boat. She was a woman of approximately sixty (60) years of age, weighed 125 pounds and got out and did exactly what Mr. GRANT had been doing in preserving and protecting the boat and eventually called for help successfully. This help came and towed the GRANT boat with the body of Mr. GRANT in it and with Mrs. GRANT, back across Kootenay Lake to Kaslo where Mr. GRANT was officially pronounced dead by a physician and surgeon who performed an autopsy, the entire body of which reads as stipulated and as found by the Court.

Preceding this trip by some several weeks, Mr. GRANT went to an agent of LLOYDS OF LONDON and took out a policy of insurance on his accidental death because he was uninsurable because of "heart disease" and had been uninsurable for a number of years. He named the GRANT CONSTRUCTION COMPANY, which he founded, as its beneficiary in the event of an accidental death, independent of all other causes. The policy was issued in the amount of \$100,000.00 and the premium paid. Mr. GRANT died and the reason for death is set forth in the autopsy and is corroborated by the medical testimony and the findings of the trial judge.

Action was brought on the policy some time later

and was pending for nearly five (5) years before brought to trial before the District Court, sitting without a jury. There was only one (1) eye-witness to the death and that was his then surviving widow, who has since died. Their son went up and helped recover the boat and body and bring Mrs. GRANT home but he knew nothing of the events leading up to death. (Parenthetically, the son and his wife have since been killed by an airplane accident.)

There is no question about jurisdiction or the proper parties, either at the trial or on this Appeal.

These respondents contend, and the Court found on competent evidence, that Mr. GRANT died because of a pre-existing arteriosclerosis. There is no evidence, and the Court found none, of physical exhaustion, but found that there was an existing arteriosclerosis which caused a coronary occlusion from which death occurred and also found that there was insufficient evidence to sustain a finding of death from physical exhaustion.

The Court also found that there was no failure of transportation or of the boat. That it was operative and manageable and that it did not fail and that "it did not fail as a means of transportation within the clear meaning of the policy" and, in fact, at the time of the exertion by Mr. GRANT, its operation had been voluntarily stopped. It is

conclusive that there was a pre-existing arteriosclerotic condition; that there was a coronary thrombosis; that the deceased had heart trouble since about the year 1950. Both doctors, being the only medical witnesses, agreed that arteriosclerosis is a disease and that it existed in Mr. GRANT , the insured.

The medical witness for the Plaintiff admitted that he relied upon the medical witness for the Defendant for pathological advice and assistance frequently on other occasions and freely admitted his qualifications in that field of medicine. This medical witness testified that the decedent had suffered from a severe arteriosclerotic condition pre-existing his death. Plaintiff's medical witness admitted, and the Court found that he had admitted, that a pre-existing arteriosclerosis would have "contributed" to the cause of death. The trial Court then found that the evidence clearly preponderates for the finding of death contributed to, if not actually caused by, the pre-existing diseased condition of the insured, and therefore the death fell within the exclusionary clause of the policy and granted judgment for the Defendant. (R. 11.)

ARGUMENT

I.

PHYSICAL EXHAUSTION--ANSWER TO SPECIFICATION OF ERROR #4.

Appellant sought recovery in the Trial Court under

a specific policy provision defining bodily injury as follows:

"E. DEFINITIONS: It is here understood and agreed that:

'1. ***

'2. BODILY INJURY WHICH SHALL OCCASION DEATH' includes, in addition to the coverage herein provided, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation."

The Trial Court considered Appellant's theory of recovery under this provision at page 7 of the Memorandum Opinion (R. 7), as follows:

"The principal thrust of Plaintiff's contentions is directed at the provision in the policy defining 'bodily injury which shall occasion death', quoted above. Coverage is there provided in case of '*** death by exposure to the elements or physical exhaustion *** resulting from *** mechanical or other failure of anything used as a means of conveyance or transportation.' Plaintiff urges that the evidence establishes death resulting from physical exhaustion brought about by the failure of his boat to serve him as a means of transportation during an unexpected storm. No cases in point are suggested to support this contention. However, the matter can be disposed of by an application of the facts to the applicable language of the policy."

After construing this provision of the policy, which construction Appellant does not challenge, the Court considered the specific elements required to prove coverage. Beginning on page 7 of the Memorandum Opinion, and continuing

to page 8, the Court (R. 7 and 8) states:

"Let us examine the theory that Mr. Grant expired by reason of 'physical exhaustion'. There is evidence that he expended considerable effort in attempting to beach and secure his boat and later to refloat it. However, no witness ever ventured an opinion that he died from physical exhaustion. At most, Plaintiff's doctor, in support of his opinion of accidental death, was of the view: (a) That decedent underwent 'a severe and extraordinary strain' and (b) That there was 'a relationship between this mans death and the extraordinary strain', and again, on cross-examination (c) 'That this stress and strain was the immediate cause of death'. Defendant's doctor on the other hand was of the opinion that the effort expended by the decedent, the worry about his wife and the immersion in cold water were only contributing factors with the pre-existing coronary arteriosclerosis in causing the coronary occlusion from which death occurred. There is insufficient evidence to sustain a finding of death from physical exhaustion."

This finding of the Court forms the basis for Appellant's Specification of Error No. 4. In arguing that the Trial Court's finding on this issue is not sustained by the evidence, Appellant cites the testimony of decedent's wife that "he was out of breath and pale and it looked like he was very tired." (Tr. p. 30, lines 18 thru 25)

However, no conclusion was ever drawn, or opinion reached, based upon Mrs. GRANT's description of deceased prior to his death, that this indicated physical exhaustion.

Appellant's doctor testified only that there was a relationship between stress and strain and the death. (Tr. p. 52) More specifically, his testimony reads in part as follows:

"A. That it was an accidental death.

"Q. Would you explain your opinion?

"A. I would like to answer and bring out two particular reasons. One is the fact that this was a severe and extraordinary strain and secondarily, the fact that the time of the occurrence and the time of his death were very closely related. I feel that there is a relationship between this man's death and the extraordinary strain." (Tr. p. 52, lines 1 thru 9.)

On cross-examination, the following question and answer were elicited:

"Q. Assuming they have had arteriosclerosis and had had it for some time, the existence of a period of time prior to this particular day would have some influence on your opinion, would it not, as to the cause of death?

"A. No, not as to the cause of death. I would say that the fact this was pre-existing would still not alter my opinion as to the fact I feel that this stress and strain was the immediate cause of death." (Tr. p. 56, lines 1 thru 9.)

On cross-examination again, Dr. PEARSON states:

"A. No, that is not it at all, sir. It is the fact that this man went into a very cold -- very cold water and was trying to hold a 1500 pound boat against the

elements. This was an excessive amount of stress. There is quite a bit of difference between that and the golf course or golf club."

(Tr. p. 61, lines 6 thru 13.)

The testimony of Dr. PEARSON set out hereinabove was directed to the question whether the death involved was an "accidental death," under O'Neil v. New York Life Insurance Company, 65 Ida. 722, 152 P.2d 707 (1944), which question was determined in favor of Appellant. The testimony established only that the death was unforeseen, sudden and unexpected.

Dr. STIER, testifying on behalf of Defendant, was of the opinion that exertion and stress would only contribute to the cause of death (See Tr. p. 88, lines 2 thru 25; p. 92, lines 10 thru 25;.)

Thus, the Trial Court had no testimony that physical exhaustion was the cause of death. No opinion was given that exertion and strain resulted in "physical exhaustion." The Trial Court would have been required to speculate on the evidence presented whether stress and strain resulted in physical exhaustion causing death.

No evidence having been presented, the Court correctly found that there was insufficient evidence to find death from physical exhaustion. Appellee respectfully contends that this finding is not clearly erroneous and is therefore binding on appeal. Kamen & Company v. Paul H. Aschkar & Company, 382 P.2d 689 (9th Cir. 1967).

II.

FINDING UNCHALLENGED--FAILURE OF MEANS OF TRANSPORTATION.

The Trial Court determined that under the policy provision urged by Appellant, a showing was required not only of "physical exhaustion", but that such was the result of failure of a means of conveyance or transportation. (R. 7) At page 7 of the Memorandum Opinion, the Trial Court stated:

"To clear away the extraneous, let us preliminarily say: it must be accepted to be a fact that decedent did not drown nor die from exposure to the elements; likewise there was no accident involving the boat nor was there a mechanical failure of the boat. I accept as established, for the purposes of this discussion, that the boat was a means of conveyance or transportation. It follows, then, that, if plaintiff is to prevail on this issue, death must have been from physical exhaustion resulting from a failure of the boat while being used as a means of transportation."

Appellant does not specify as error the Court's construction or finding on this provision of the insurance policy. Thus, even if it should be found that the Court erroneously determined that death was not due to "physical exhaustion," recovery would still be barred by the finding that death was not the result of a "failure of anything used as a means of conveyance or transportation." Error, if any, is harmless. Owens v. White, 380 F2d 310 (9th Cir. 1967)

proof of physical exhaustion and failure of transportation was required by the policy.

III.

CONSTRUCTION OF CONTRACT AND APPLICATION OF LEGAL PRINCIPALS

Notwithstanding the holding that there was no "bodily injury" which would authorize recovery under the policy of insurance, Trial Court went on to consider whether the provisions of the policy insured the demise of decedent reflected in the facts" (R. 9). The insuring clause of the policy under which Appellant claims coverage reads as follows:

"INSURING CLAUSE: If at any time during the currency of this certificate the assured shall sustain any accidental bodily injury which shall, solely and independently of any other cause within twelve (12) calendar months from the date of the accident causing such bodily injury, occasion the disablement of the assured as hereinafter defined and the claim be substantiated under this Certificate, the Underwriters will pay to the Assured, his Executors, Administrators or Assigns (or in case of such bodily injury shall occasion the death of the Assured, to the Beneficiary or Beneficiaries named herein) according to the schedule of Compensation herein specified within thirty (30) days after satisfactory proof of death or disablement to the Underwriters, . . . not exceeding in all the Capital Sum of \$100,000.00 . . ."

Obviously, the policy of insurance required proof

f bodily injury, and the Court having found that there was
o "bodily injury" as prayed for in the Complaint, the action
ould have been dismissed at that point. It is Appellees
ontention that insufficient error having been specified to
ully challenge the Trial Court's finding with regard to
bodily injury", that this Honorable Court should sustain the
ecision without going further.

But assuming, arguendo, that the Trial Court's
urther findings were necessary, the decision reached was
orrect.

At page 9 of the Trial Court Memorandum Opinion,
dopted as Findings of Fact and Conclusions of Law of the
ourt (R. 11), it is stated:

"The Court now turns its attention to
the subject of the policy exclusions.
Having determined that death was accidental,
it becomes necessary to determine whether
the provisions of the policy insured the
demise of decedent reflected in the facts.
Defendant seeks to avoid liability on the
ground that the policy provisions exclude
recovery for the loss involved in this
case. The burden in this jurisdiction
rests on the insurer to prove the facts
necessary to deny coverage. O'Neil v.
New York Life Insurance Co., supra.

"In capsule form, the coverage offered was
for accidental bodily injury which solely
and independently of other cause occasioned
death and specifically excluded death
directly or indirectly caused or contributed
to by disease or natural causes. " (Emphasis
added) (R. 9)

The insuring clause, set out heretofore in full, provides for payment in case of death resulting from accidental bodily injury "solely and independently of any other cause." The specific exclusionary language of the policy reads in pertinent part as follows:

- "1. EXCLUSIONS: This certificate does not cover death, injury or dismemberment:
'(a.) ***
'(b.) Directly or indirectly caused or contributed to by *** disease or natural causes ***."

By virtue of Erie R. Co. v. Tompkins, 304 U.S. 4 (1938), 82 L.Ed. 1188, the Trial Court correctly determined that the substantive law of Idaho should be applied so far as ascertainable. (R. 6) We are unable to cite any controlling Idaho decision bearing upon the facts or policy involved in this case. Nor did the Trial Court discover any "controlling or, indeed, helpful Idaho decisions." (R. 9)

The distinguishing portions of the policy of insurance here involved clearly indicate that if disease "directly or indirectly caused or contributed" to death, coverage is excluded under the policy. Accidental or bodily injury must "solely and independently" be the cause of death. The Trial Court, at pages 10 and 11 of the Memorandum Opinion, declared the law applicable as follows:

"I believe the Idaho Supreme Court would, if the case were presented to them, hold

that if the diseased condition of Mr. Grant directly or indirectly caused or contributed to his death, then the clear terms of the policy excluded coverage for the loss claimed.

"We deal here with a written contract of insurance which is clear and unambiguous. An exception to coverage is provided where death is caused or contributed to by any pre-existing disease. I conclude that the evidence clearly preponderates for the position that the death of deceased was contributed to, if not actually caused, by the pre-existing diseased condition of the insured.
****" (R. 10, 11)

This construction of the policy provisions and application of legal principles is well supported by the authorities. Adkins v. American Cas. Co., (W. Va., 1960) 14 SE 2d 556, 84 ALR 2d 169, and cases cited at pages 202, 203, 204 and 205; Britton v. Prudential Ins. Co., (1959) 205 Tenn. 726, 330 SW 2d 326, 82 ALR 2d 605, at page 615, footnote 5.

Appellant argues that a rule of "proximate cause" should be applied, and that the arteriosclerosis of Mr. GRANT was not the proximate cause of his death. In the case of Evans v. Metropolitan Life Ins. Co., 103 Wash. 429, 174 2d 961 (1946), the court considered the rule of proximate cause in reviewing a verdict for the decedent who had died shortly after pushing his automobile over a slight upgrade. The policy of insurance contained an exclusion if disease contributed to death. The death certificate indicated

coronary thrombosis due to arteriosclerosis. In reversing the denial of a Motion for Judgment notwithstanding the verdict, the Court stated:

"The evidence of the doctors, the pertinent portions of which are set out in this opinion, was to the effect that the condition of the insured's heart contributed to his death. The term 'proximate cause' has no application in ascertaining liability upon policies which contain clauses relieving the insurance companies from liability in cases where death is caused or contributed to directly, or indirectly, or wholly or partially, by disease, and the evidence showed that the disease contributed to the death. Where the liability of the insurance company is so restricted it is not sufficient for a beneficiary to establish a direct causal connection between the accident and the injury. He is compelled to show that the resultant condition was caused solely by accidental means; and if the proof shows a pre-existing infirmity which was a contributing factor, he cannot recover. This holding is dictated by the express terms of the contracts under consideration." (174 P2d, p. 977)

In the case of Kingsland v. Metropolitan Life Ins. Co., 97 Mont. 558, 37 P2d 335 (1934), involving a similar policy provision excluding recovery in case of a contributing disease, it was stated:

"The term 'proximate cause' is inapt in this class of cases; under the parties express contract a recovery can be had only if death resulted 'solely' (not proximately) from injuries received through accidental means, and,

if the insured's condition was a contributing cause, there can be no recovery. (citations omitted) The doctrine of proximate cause is applicable, in this class of cases, and was applied in the Sullivan case, 'only to aid in determining whether or not the loss was caused solely by the accident or act against which the indemnity was given.' 45 CJ 900."

Great weight must be attached to the District Court's determination as to the law of the state where there has been no clear exposition of the controlling principles by the highest court of that state. Insurance Co. of North America v. Thompson, 381 F2d 677 (9th Cir., 1967) This Honorable Court has declared that the determination of law by a District Court "will be accepted on review unless shown to be clearly wrong." Owens v. White, 380 F2d 310 (9th Cir., 1967)

IV.

EVIDENCE SUPPORTING DECISION, IN ANSWER

TO SPECIFICATION OF ERROR NO. 3

The Trial Court found that the evidence wholly preponderates for the finding that death was caused or contributed to by the pre-existing arteriosclerosis of the deceased. (R. 11)

Neither of the doctors called on behalf of the parties to the action had an opportunity to examine the

deceased. However, an autopsy report and a death certificate were entered into evidence and considered by the doctors in their testimony. The autopsy report reads as follows:

"Autopsy findings in this case of the late Mr. Joseph William Grant, 65 years old adult male. Time of death about 2:30 P.M., June 18, 1962. Death was due to acute coronary obstruction by infarctus of the right descending branch of the coronary artery of the heart. Death was moreorless instantaneous." (Tr. p. 57, lines 7 thru 13)

The death certificate, Defendant's Exhibit #7, entered in evidence at page 67 of the Reporter's Transcript, states that "Cause of Death" was "due to (or as a consequence of) arteriosclerosis. Many years."

The application for the insurance policy in question, entered in evidence at page 19 of the Reporter's Transcript as part of Plaintiff's Exhibit #6, indicates that deceased was turned down for insurance because of a suspected heart condition in 1950. The testimony of Mrs. GRANT, the widow of deceased, indicated that deceased had a pre-existing heart condition. She states:

"Q. Now he had had heart trouble prior to that time, had he not?

"A. Yes, sir.

"Q. He had been treated by doctors?

"A. Yes.

"Q. And didn't you make the statement at

another time that he had been advised not to overdue or over-exert himself?

"A. He has -- as I recall, he had not been told not to play golf or not to go fishing or anything. He didn't do extra-strenuous work, like shoveling, but he had not done anything like that."
(Tr. p. 37, lines 14 thru 25)

Again, at page 39 of the Transcript, lines 5 through , she states:

"A. I knew he had a bad heart and I tried to tell him he should take it easy myself. I don't know what had been told to him but ---"

The doctor called on behalf of Appellant in the Trial Court testified primarily that decedent's death was accidental. However, at page 54 of the Reporter's Transcript, beginning at line 19, the following is found:

"A. If he had a pre-existing arteriosclerosis and I think every one in this room has it -- that this would ---"

"Q. Are you trying to say it would contribute to the cause of death?

"A. No, I am not saying it would contribute to the cause of death. A pre-existing arteriosclerosis may or may not.
Well, it could contribute to the cause of death, yes." (Emphasis added)

The pertinent questions and answers continue to the next page, and are as follows:

"Q. And it would be one of the factors that would contribute to the cause of death? One of the factors?

"A. One of the factors, however ---

"Q. There would be others?

"A. Yes, on the other hand, there are many people who live with hardening of the arteries up to 100 years of age."

(Tr. p. 55, lines 1 thru 5)

At page 61 of the Reporter's Transcript, beginning on line 16 and continuing through line 22, the testimony of the doctor reads:

"Q. You just have your mind made up that this was an accidental death, haven't you, no matter what I ask you?

"A. No, accidental death could only be caused by an accident and the arteriosclerosis couldn't have anything to do with it. I am not saying it didn't have anything to do with it, but I am just going by my experience and the fact that I have testified in cases of this type where this problem has come up. . . ." (Emphasis added.)

The doctor who testified on behalf of Appellee in the trial court was one named by the doctor for Appellant.

Tr. p. 62, line 21) This doctor was a specialist in pathology.

Tr. p. 68, line 21) After being read a hypothetical question, the doctor testified:

"A. I don't believe it was accidental.

"Q. In that answer did you assume that there was a sclerotic condition in the body of the deceased?

"A. Yes, sir, I do, arteriosclerotic.

"Q. What effect would this condition be as concerns the hypothetical question?

"A. This disease causes narrowing of the coronary arteries and they are prone to complete obstruction which they can do at any time and frequently will do under conditions of exertion, and at the time they obstruct or occlude, that this can cause death instantaneous over a period varying time depending on how much blood supply is supplied to the heart.

"Q. Could it happen in different circumstances, different type of exertion than this?

"A. Yes. It can happen with no exertion.

"Q. Like out on a golf course or on a green?

"A. Yes.

"Q. Or on a street or in bed?

"A. Frequently happens after meals.

"Q. And that then in your opinion was the cause of his death?

"A. Yes."

(Tr. p. 73, lines 1 thru 25)

On cross-examination, the doctor testified as follows:

"Q. Doctor, the autopsy reported an acute coronary obstruction; is that true?

"A. Yes.

"Q. This could happen in an accident without disease; isn't that possible?

"A. Remotely possible. it could happen without disease." (Emphasis added)
(Tr. p. 76, lines 3 thru 9)

"A. There is medical evidence because he died with coronary thrombosis and in my opinion with obvious underlying arteriosclerosis, and the fact he was turned down for insurance for assumed heart disease twelve years previously just reinforces my opinion that he had arteriosclerosis."
(Tr. p. 79, lines 3 thru 8)

"Q. Doctor, assuming this man was exposed and standing in cold water, what effect would that have, if any, upon his circulatory system?

"A. It could have contributed to the thrombosis.

"Q. An additional shock to the system?
(Tr. p. 87, lines 21 thru 25)

"A. Yes, certainly.

"Q. Doctor, then we have here exertion, emotional stress, we have exposure to the cold, all these things, you say, would produce the thrombosis?

"A. Contribute to it.

"Q. What produces the thrombosis then?

"A. Well, this is a coagulation mechanism that is triggered off, if you will, by many different factors and it can occur spontaneously without any apparent cause."
(Tr. p. 88, lines 1 thru 10)

"Q. And thrombosis often is a product of that situation; isn't that true?

"A. Yes, certainly.

"Q. And it is by virtue of the exertion, the emotional stress or exposure to the cold that can produce this immediate situation we are talking about, thrombosis?

"A. Not per se. You have to have some basic underlying cardiac vascular disease. It wouldn't occur in vessels that were capable of responding to these added loads."

(Tr. p. 88, lines 18 thru 25)

"Q. Ninety per cent of the people that do have it, would it be a contributing factor to their death?

"A. No.

"Q. But you can't give an example where it wouldn't be?

"A. It is to a minor degree. There is no secondary changes in the heart to indicate it has caused trouble before. The major pathological findings are totally unrelated to any cardiac condition. In those situations which probably represent at least half the autopsies I perform, I would not say coronary disease contributed significantly to the death at all.

"Q. But the other half do?

"A. Well, this being the greatest cause of death today I would guess that approximately half the autopsies I perform it is either a direct cause of death or definitely was contributory, yes."

(Emphasis added) (Tr. p. 92, lines 10 thru 25)

The final testimony of the doctor was in response to redirect examination beginning on page 93 of the Transcript and continuing to page 94.

"Q. This sclerotic condition is a contributing factor in your opinion?

"A. Definitely."

Thus, there was ample evidence to support a finding that the diseased condition of Mr. GRANT was a contributing cause of his death. The Trial Court's finding is not "clearly erroneous" and therefore should be sustained under the applicable rule. Kamen & Co. v. Paul H. Aschkar & Co., 382 F2d 689 (9th Cir., 1967)

V.

ANSWER TO SPECIFICATION OF ERROR NO. 5

Appellant contends that the pre-existing disease of deceased will not defeat recovery unless it is found to be a "direct or proximate cause of death rather than a remote or contributing cause or condition."

We have here a contract of insurance which contains definite wording, clear and unambiguous. It specifically states that coverage is excluded if disease either caused or contributed to death. The plain wording of the policy was necessarily given effect.

In the case of Lively v. City of Blackfoot, 91 Idaho 80, 416 P2d 27 (1966), the Supreme Court of the State of Idaho stated: "Contracts of insurance, like other contracts, must be construed and understood, in absence of ambiguity, in their plain,

ordinary and proper sense, according to the meaning as determined from the plain wording of the policy." (citations omitted) (91 Idaho, at page 83)

The contract does not support the position contended for by Appellant. The Court should not by construction create a liability which the insurer has not assumed.

Lively v. City of Blackfoot, supra.

CONCLUSION

The judgment of the Trial Court should be affirmed in every respect. The questions presented to the Trial Court were primarily upon issues of fact, and after weighing the evidence Appellant's claims were rejected. Certainly some of the testimony was conflicting, but the Trial Court had the benefit of hearing the testimony as it was given and observing each witness' demeanor and attitude. Appellee respectfully requests that no undue reliance be placed upon the isolated statement of any witness.

The only bodily injury sought to be proved by Appellant in the Trial Court was physical exhaustion resulting from a failure of transportation. The evidence in its entirety fails to establish that such an injury occurred. No other bodily injury was indicated or even suggested by the evidence. The finding of the Court that the alleged (but unproved) physical exhaustion did not result from a

failure of transportation remains unchallenged and thus
should be conclusive of this Appeal. This policy requires
proof of bodily injury and none is otherwise shown.

Respectfully submitted,

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I certify that, in connection with the preparation
of this brief, I have examined Rules 18, 19 and 39 of the
United States Court of Appeals for the 9th Circuit, and that,
in my opinion, the foregoing Brief is in full compliance with
those rules.

Attorney for Appellee

I hereby acknowledge receipt of three (3) true
and correct copies of the within and foregoing Brief on
the _____ day of May, 1968.

Attorney for Appellant.

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONNIE JEAN, INC. and FISHERMEN'S UNION
LOCAL 33, INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION,

Respondents.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

MAR 1 1968

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United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 22,471

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONNIE JEAN, INC. and FISHERMEN'S UNION
LOCAL 33, INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION,

Respondents.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforcement of its order,

¹ The pertinent provisions of the Act are reprinted as Appendix A. *infra*, pp. A-1-A-3.

issued against respondents on February 13, 1967, (R. 49-50) ² and reported at 162 NLRB No. 154. This Court has jurisdiction of the proceeding, the unfair labor practice having occurred in San Diego, California. ³

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Briefly, the Board found that Connie Jean, Inc. (herein "the employer") violated Section 8(a)(1), (2), and (3) of the Act by recognizing and entering into a contract with respondent Union (herein "Local 33") at a time when another Union was advancing a conflicting claim to representation of the crew of the vessel Connie Jean, and by enforcing and maintaining such contract which contained a union-security clause. In addition, the Board found that Local 33 violated Section 8(b)(1)(A) and (2) by demanding and accepting recognition from, and entering into a contract with the employer while there was a conflicting claim concerning representation, and by enforcing and maintaining the contract containing the union-security clause.

A. Background of the dispute

Eugene Cabral, the master and part owner of the vessel Connie Jean, had previously been part owner and master of a tuna fishing vessel known as the Ecuador. (R. 22; Tr. 23).

² "R" refers to the formal documents reproduced, pursuant to Court Rule 10, as "Volume I, Pleadings"; "Tr." refers to the portions of the stenographic transcript of the unfair labor practice hearing, also reproduced pursuant to Rule 10. References designated "G.C. Ex." or "Resp. Ex." are to exhibits of the General Counsel and respondent respectively.

³ There is no issue as to the Board's jurisdiction.

In recent years, the crew of the Ecuador had been represented for collective bargaining purposes by the Cannery Workers and Fishermen's Union of San Diego, AFL-CIO (herein "Cannery Workers"), and had been covered by a collective bargaining contract which contained a union-security clause (R. 22; Tr. 43). In October 1965, when the Ecuador had completed a voyage, Cabral terminated the employment of his entire crew because he was selling his interest in the Ecuador and no longer planned to continue as its master. At the time, Cabral was part owner (40 percent) of the corporation (respondent employer) which had the Connie Jean under construction, and it was planned that he would sail as its master when the vessel was completed. (R. 22; Tr. 9).

When the 12 members of the crew of the Ecuador were discharged by Cabral, a number of them asked if they might have employment with him on the Connie Jean when it was ready to sail. Cabral replied that "if they were in [he] would give them preference over someone else." (R. 22; Tr. 41, 42). As it turned out, the Connie Jean was not completed until December 1965, and as of the time of the hearing in April 1966, it had not yet gone out on its maiden voyage, but was still being outfitted (R. 22; Tr. 10, 11).

B. The representation claims and the signing of the contract

On January 18, 1966,⁴ Cannery Workers filed a representation petition with the Board, seeking to represent the Connie Jean's crew. The petition named Cabral as the employer and Local 33 as an organization with a representational

⁴ All events described hereinafter occurred during 1966.

interest in the employees. (G.C. Ex. 4). On January 19, the Board by letter, with a copy of the petition enclosed, notified Cabral and Local 33 of the filing of the petition (Tr. 35, 36). On February 4, the Regional Director notified the employer and the two unions that the petition was dismissed because “. . . the question concerning representation sought to be raised by the petition is premature at this time inasmuch as the fishing vessel involved is still under construction and its crew has not been hired . . .” (R. 22; Tr. 36, G.C. Ex. 5). In a letter dated February 9, counsel for Cannery Workers advised Cabral that despite the dismissal of such petition he was being “put on notice that said union has and claims an interest in representing the crew-members of the boat when the crew has been hired. At that time, we shall expect that the interest of the Cannery Workers and Fishermen’s Union will be respected . . .” (R. 22; Tr. 38, 39; G.C. Ex. 7).

While the *Connie Jean* was not then ready to sail, it is the practice in the industry to hire the crew in advance of sailing, in order to work on the nets and perform other tasks preparatory to the voyage.⁵ Thus, Cabral made arrangements to hire a crew and requested 10 persons to report on February 15, to work on nets which were to be used on the *Connie Jean* when it sailed.⁶ Of the 10 crew members reporting on that date, 8 had been members of the Ecuador on its final voyage.

⁵ Even though the crew members receive no compensation for this advance work, their compensation being by shares in the catch at the end of the voyage, custom dictates that the employment relationship commence on the date when they first report for voyage preparations. (R. 22; Tr. 27, 28).

⁶ The *Connie Jean* expected to have a crew of 13 when it eventually sailed. Others were hired at a later date (R. 23; Tr. 11, 14, 197).

When the 10 crew members arrived for work on February 15, Cabral addressed them as a group stating that they would "probably be confronted with the unions today," that he "assumed that there would be two unions" and that of the two he would "prefer John Royal's union," i.e., Local 33 (R. 23; Tr. 29, 30, 32). Cabral did not mention Cannery Workers (R. 23; Tr. 30). Later in the morning, Cabral was approached by John Royal, a representative of Local 33, in the area where the crew was working (R. 23; Tr. 30). Royal requested, and was granted permission to talk to the crew members. (R. 23; Tr. 30, 31). On the same day, Royal obtained the signatures of 8 of the crew members to a petition on which they purported to designate Local 33 as their representative for collective bargaining purposes with the employer (R. 23; Tr. 46, Resp. Ex. 1). Seven of the 8 who signed the petition had been members of the Ecuador on its last voyage, and were members in good standing of Cannery Workers.⁷

Royal thereafter, on the same or following day, showed the petition with the signatures to Cabral, and on February 16, between 4 and 5 p.m., Cabral met with representatives of Local 33 and executed a 3-year contract covering the crew of the Connie Jean. The contract contains a union-security clause requiring membership in Local 33 as a condition of employment (R. 23; Tr. 33, 34, G.C. Ex. 3). On February 21, Cannery Workers filed another representation petition (G.C. Ex. 6), identical to its previous petition, covering crew members of the Connie Jean. In accordance with the Board's usual practice, that proceeding is in abeyance pending resolution of the unfair labor practices charged in this case (R. 23).

⁷ See *infra*, p. 10.

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that, by recognizing and entering into a contract with Local 33, while there was a real question concerning representation, and by enforcing and maintaining such contract, which contained a union-security clause, the employer engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act. The Board further found that, by demanding and accepting recognition from and entering into a contract with the employer while there was a real question concerning representation and by enforcing and maintaining the contract which contained a union-security clause, Local 33 engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act. Accordingly, the Board ordered the employer to cease and desist from enforcing its contract with Local 33, and to withdraw and withhold recognition from Local 33 unless and until certified by the Board. Local 33 was ordered by the Board to cease and desist from enforcing the contract and from demanding or accepting recognition from the employer. Both respondents were ordered to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND VIOLATIONS OF SECTION 8(a)(1), (2), (3) AND SECTION 8 (b)(1)(A) & (2) OF THE ACT BASED ON THE NEGOTIATION, EXECUTION, AND ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT CONTAINING A UNION-SECURITY CLAUSE, BY LOCAL 33 AND THE EMPLOYER AT A TIME WHEN A RIVAL UNION, BY VIRTUE OF ITS SUBSTANTIAL CLAIM TO RECOGNITION, HAD RAISED A REAL QUESTION CONCERNING REPRESENTATION

When a substantial number of employees in an appropriate unit evidence conflicting desires as to which union, if any,

they wish to join, their employer must maintain strict neutrality, for any action by him which aids or favors one organization over another can greatly influence the employees' decision and effectively deny them the freedom of choice guaranteed by the Act. *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267; *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 226; *N.L.R.B. v. Sunbeam Electric Mfg. Co.*, 133 F.2d 856, 860 (C.A. 7). And since granting exclusive recognition to a union constitutes strong support of the favored union, the Board and the courts have held that the employer must refrain from such action until the resolution of the representation dispute is determined by the Board in an impartial and reliable manner, to-wit, a Board conducted election. *Elastic Stop Nut Co. v. N.L.R.B.*, 142 F.2d 371, 375-376, 379 (C.A. 9), cert. denied, 323 U.S. 722; *Hoover Co. v. N.L.R.B.*, 191 F. 2d 380, 385-386 (C.A. 6); *N.L.R.B. v. National Container Co.*, 211 F. 2d 525, 536 (C.A. 2); *Ohio Ferro-Alloys Corp. v. N.L.R.B.*, 213 F. 2d 646, 650-651 (C.A. 6); *N.L.R.B. v. Signal Oil and Gas Co.*, 303 F. 2d 785, 788 (C.A. 5). As recently stated by this Court (*Retail Clerks Union, Local 770 v. N.L.R.B.*, 370 F. 2d 205, 207:

An employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of these unions until its right to be recognized has finally been determined under the special procedures provided in the Act.

In order reliably and definitively to settle the vital question of which of two or more competing unions, if any, has been chosen to represent the employees, the Board requires that an employer use the election machinery which Congress created to resolve disagreements of this kind. Thus, under

Section 9(c)(1) of the Act, the Board is directed to conduct a representation election by secret ballot if, upon the filing of a petition by one or more employees, a union, or the employer, investigation and a hearing show that a real question of representation exists. The result of such an election constitutes the best evidence possible of the employees' choice, resolving the representation question and eliminating any obstacle to free collective bargaining, *United Mine Workers v. N.L.R.B.*, 355 U.S. 453, 460; *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, 99-100; *N.L.R.B. v. A. J. Tower*, 329 U.S. 324, 330-332; *N.L.R.B.*, Tenth Annual Report, page 39.

This principle, commonly referred to as the *Midwest Piping* doctrine,⁸ as applied by the Board, stands for the proposition that an employer faced with a real question concerning representation interferes with his employees' right of self-organization when, without resorting to Board machinery, he resolves the question by according recognition and executing a contract with one of two rival union claimants; and, as a corollary, that the union thus favored has likewise intruded upon the employees' self-organization rights. *Shea Chemical Corp.*, 121 NLRB 1027; *Novak Logging Co.*, 119 NLRB 1573; *Scherrer and Davisson Logging Co.*, 119 NLRB 1587.

The doctrine, however, has its qualifications. It is not unlawful for an employer voluntarily to recognize a union without resorting to Board machinery if, in fact, such union

⁸ The name derives from *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060. It has been applied consistently by the Board, and has been approved in *N.L.R.B. v. National Container Co.*, *supra*, 211 F.2d at 536 (C.A. 2); *District 50, UMW v. N.L.R.B.*, 234 F.2d 565, 569 (C.A. 4); *N.L.R.B. v. Signal Oil and Gas Co.*, *supra*, 303 F.2d at 787 (C.A. 5); *Ohio-Ferro-Alloys Corp. v. N.L.R.B.*, *supra*, 213 F.2d at 649, 650-651 (C.A. 6); *St. Louis Independent Packing Co. v. N.L.R.B.*, 291 F.2d 700, 704 (C.A. 7); *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F. 2d 176, 182 (C.A. 8).

represents a majority in an appropriate unit and no real issue of conflicting rival claims is presented.⁹ In determining the existence of a “real issue” concerning representation, the Board has held that the filing of an election petition is not an indispensable prerequisite to the existence of such a question. *Novak Logging Co.*, *supra*, 119 NLRB at 1574; *Sherrer and Davisson Logging Co.*, *supra*, 119 NLRB at 1588, n. 6; *Sunbeam Corp.*, 99 NLRB 546, 550-554. Accord; *Harrison Sheet Steel Co. v. N.L.R.B.*, 194 F.2d 407, 409-410 (C.A. 7). Thus, the Board has applied the doctrine in situations where a substantial claim to representation exists that normally would be resolved by an election. Cf. *Pittsburgh Valve Co.*, 114 NLRB 193, *rev’d*, on other grounds, 234 F.2d 565 (C.A. 4). In short, such a “question” exists so long as the employer — in the context of a “rival union” campaign — is put on notice that the backing claimed by one union is a bona fide tenable declaration of representation rights and not a mere “naked claim.” *N.L.R.B. v. Swift & Co.*, 294 F. 2d 285 (C.A. 3). Accord: *Burke Oldsmobile, Inc.*, 128 NLRB 79, 86, *enf’d*, 288 F. 2d 14, 16 (C.A. 2); *Gaylord Printing Co., Inc.*, 135 NLRB 510, 511. Similarly, the same principle applies even where, as in this case, a petition for representation has been dismissed without prejudice, but a real question remains as to which rival union represents a majority. *District 50, UMW v. N.L.R.B.*, *supra*, 234 F. 2d at 569-570 (C.A. 4). Accordingly, the principal issue in this case is whether, as the Board found, a real question concerning representation existed at the time the employer extended recognition to Local 33 and entered into a contract with that union.

⁹ The Board regards the existence of a real question concerning representation as a prerequisite to the application of the *Midwest Piping Rule*. See *William Penn Broadcasting Company*, 93 NLRB 1104.

When respondents entered into a collective bargaining agreement on February 16, the record shows that a majority of the crew members hired for the *Connie Jean* were members in good standing on the books of Cannery Workers, which union for a number of years had represented them while they were employed by Cabral aboard the *Ecuador*. Though the employees were no longer covered by the contract between Cannery Workers and Cabral with respect to their work on the *Ecuador*, nor actively being represented by Cannery Workers at the time in question, the membership records show that all 8 of the former *Ecuador* members were still members in good standing at the time Cannery Workers filed its original representation petition with the Board. They were also members in good standing when Cabral and Local 33 signed the contract, and on February 21, when Cannery Workers filed its second petition with the Board. (R. 25; Tr. 54, 55, 93, 94; G.C. Ex. 8-15, 17). Under standard Board practice such evidence of membership is sufficient to meet the Board's required 30 percent showing of interest by a union, necessary to obtain an election.¹⁰

Before the Board, respondents argued that the employees' retention of membership in Cannery Workers was insufficient to create a real question concerning representation in the face of the petition evidencing Local 33 as their chosen bargaining representative. Respondents claim that there are other reasons why the employees may have remained members of Cannery Workers, without necessitating a desire for continuing representation. They cite as examples, the protection of death

¹⁰ See Section 101.18, N.L.R.B., Statement of Procedure, Series 8 (29 C.F.R. Section 101.18). The Board's 30 percent showing of interest requirement can be satisfied by a union through signed authorization cards, a signed designation petition, or as in the instant case, membership records. NLRB Field Manual, July 1, 1967, Section 11022.3.

benefits (Tr. 68-69) and, since it is apparently common for employees to maintain dual membership in unions in this industry, to insure readmission to Cannery Workers without the payment of a reinstatement fee (Tr. 67-68). However, since it is claimed to be common to belong to more than one union, the employees here may have felt it was necessary to designate Local 33 to insure themselves of work — in light of Cabral's expressed preference for that union — and not because they really desired Local 33 representation. This uncertainty adds support to the need for applying the *Midwest Piping* doctrine in order to provide a secret ballot to determine the employees' true choice.

The fact that on February 15, a majority of the crew signed a petition authorizing Local 33 to represent them is unavailing to respondents, since two unions were competing to represent the employees. Dual allegiance is common when more than one union is competing to represent employees, and the Board takes the view that where the only evidence of the choice of employees is found in possibly conflicting designations, e.g., the membership records of Cannery Workers and the designation petition of Local 33, such designations are to be regarded as unreliable, and the choice of an exclusive representative must await an appropriate election. *Midwest Piping and Supply Co., Inc.*, *supra*, 63 NLRB at 1070; *Sunbeam Corp.*, *supra*, 99 NLRB at 551; *Novak Logging Co.*, *supra*, 119 NLRB at 1574-1575. Further, the Board holds that in a competing-union situation, "The numerical percentage of employees represented by one of the contending unions does not foreclose the existence of a real dispute as to representation so as to privilege a premature recognition." *Higgins Industries Inc.*, 150 NLRB 106, 119.

That Cabral was sufficiently put on notice that there was a real question concerning representation between two competing unions is clearly evidenced by the record. Thus, Cannery

Workers took all possible steps to apprise Cabral of its continuing claim to represent the employees in question. Apparently aware of Cabral's intention to give preference to former crew members of the Ecuador, Cannery Workers filed a representation petition, which was dismissed without prejudice as being premature, prior to the time of the actual hiring of the Connie Jean crew. Subsequent to receiving notice of the petition, Cabral also received a letter from Cannery Workers asserting its continuing claim to representation at such time as a crew was to be hired. That Cabral himself recognized the fact that two unions would be competing for the representation rights of the crew was evidenced by the fact that he addressed the crew to that effect, and at the same time expressed a clear preference for Local 33. At no time did he notify Cannery Workers of the hiring of the crew. Though the employees gave no indication to Cabral personally that they no longer desired to be represented by Cannery Workers, Cabral "accepted as determinative the designations on a petition signed after his statement of preference and immediately, without seeking to use Board machinery or even notifying the Cannery Workers, signed a contract" with Local 33 containing a union security-provision (R. 26).

Even if Cabral's statement of preference was not in itself unlawfully coercive, when coupled with the subsequent contract execution, it plainly was "a factor calculated to influence the crew to favor the preferred union" (R. 26). Cf. *Sunbeam Corporation, supra*, 99 NLRB at 550. As the Supreme Court stated in *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72, 78: "[S]light suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring the employer's strong displeasure." In the instant case, Cabral's statement, coupled with the speed with which the contract was negotiated — within 30 hours from the time Royal secured

the petition from the crew — clearly warranted the Board's finding that the inclusion of the standard union security clause under such circumstances constitutes strong support for the favored union and is further evidence of the violation. "The quick execution of the [union security] agreement at a time when the employer knew of claims by another labor organization that it represented a majority of the employees, is itself evidential of assistance to the contracting union." *N.L.R.B. v. John Engelhorn & Sons*, 134 F.2d 553, 555-556 (C.A. 3). Cf. *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 279 F.2d 83, 87-88 (C.A. 2).

In sum, when all of the relevant factors are considered — the past relationship between Cabral, the employees and Cannery Workers; respondents' receipt of the January 18 representation petition; Cabral's subsequent receipt of Cannery Workers February 9 letter asserting its continuing representation claim; Cabral's remarks to the crew on February 15; and the speedy contract negotiation — the weight of the evidence fully supports the Board's conclusion that on February 16 there was an "active and continuing claim" by Cannery Workers, and that despite his full knowledge that there was a real question concerning representation, the "employer elected to make his own choice without regard to whether the designation of [Local 33] represented the true wishes of the crew" (R. 26).

In addition, Local 33 also bore responsibility for "... depriving the employees of their right to select their representatives in a free contest between rival organizations." *N.L.R.B. v. Signal Oil and Gas Co.*, *supra*, 303 F.2d at 787. The Board found Local 33's violation to stem from the fact that it "demanded, entered into, and enforced an agreement which was not lawful under the circumstances" (R. 23-24). As the Supreme Court stated in *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 738, "It was the

intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employees rights.”¹¹ The Seventh Circuit, in *N.L.R.B. v. Young Metal Products Co.*, 385 F.2d 544, 547, a case involving the premature recognition by a company of a union as exclusive bargaining agent, declared, “We also hold that the Company and the [union] violated Section 8(a)(2), (3) & (1) and Section 8(b)(2) & (1)(A) of the Act by entering into and enforcing a contract containing a union security provision in a contract that was not valid.” See also, *Bernhardt Bros. Tugboat Service v. N.L.R.B.*, 328 F.2d 757, 759 (C.A. 7). Further, the Sixth Circuit, in *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 927-928, held that in a rival union context, where no clear showing of majority status had been made by either union, the employer and the respondent union were in violation of the Act by entering into a bargaining agreement.

In the instant case, Local 33 was made aware of Cannery Workers’ continuing claim of representation when it received notification by letter from the Board’s Regional Office, of the Cannery Workers’ January 18 representation petition. (G.C. Exh. 4). The subsequent seeking and obtaining of quick negotiations, inclusion and enforcement of a standard union-security and dues-check-off clause in a contract (G.C. Exh. 3)

¹¹ The major issue in the *ILGWU* case was whether execution of a collective bargaining contract with a minority union constituted a violation of 8(a)(2) and 8(b)(1)(A). Since the Court held that this did violate the Act, the Court’s rationale is applicable to the present situation where as yet there has been no determination of the representative status, if any, of either of the rival unions, because a question concerning representation still exists.

which was negotiated and signed during the pendency of an unresolved question concerning representation, constituted a violation of 8(b)(2) and (1)(A) of the Act — just as it constituted a violation of Section 8(a)(3) by the employer.

In arguing against application of the *Midwest Piping* rule in this case, respondents pointed to a number of cases where its application has been rejected by the courts. While it is true that courts have on occasion disagreed with the Board's application of *Midwest Piping* in a particular case,¹² it is equally plain that these courts have always endorsed the substance of the general doctrine.¹³ See cases cited, *supra*, p. 8, n. 8. Furthermore, in each of the cases relied on by respondents, the court's disagreement with the Board was predicated on a view that the facts did not show the existence of a real question concerning representation, and that the employer could therefore recognize that union whose majority had been conclusively established.

Thus, in several of the cases relied on by respondents, the courts found that clear proof of majority representation

¹² *N.L.R.B. v. Air Master Corp.*, 339 F.2d 553 (C.A. 3); *N.L.R.B. v. North Electric Co.*, 296 F.2d 137 (C.A. 6); *N.L.R.B. v. Swift & Co.*, 294 F.2d 285 (C.A. 3). *Cleaver-Brook Manufacturing Co. v. N.L.R.B.*, 264 F.2d 637 (C.A. 7), cert. denied 361 U.S. 817. *District 50 UMW v. N.L.R.B.*, 234 F.2d 565 (C.A. 4); *N.L.R.B. v. Indianapolis Newspaper, Inc.*, 210 F.2d 501 (C.A. 7).

¹³ In *N.L.R.B. v. Flotill Products, Inc.*, 180 F.2d 441, this Court did not rule directly on the applicability of the doctrine. It declared that though the employer's renewal of a closed shop contract with the union while representation proceedings were pending may have been improper, enforcement of the Board's cease and desist order would not be granted in view of the fact that subsequent to the entry of the order, the representation proceedings had been dismissed by the Board.

was evident from existing facts. For example, that a neutral party checked the union's authorization cards (*N.L.R.B. v. Air Master Corp.*, *supra*, at 555; *District 50, UMW v. N.L.R.B.*, *supra*, at 568); that the employees themselves affirmatively signified their choice in a manner additional to the mere signing of authorization cards (*N.L.R.B. v. Air Master Corp.*, *supra*, at 555, 556; *N.L.R.B. v. Standard Steel Spring Co.*, 180 F. 2d 942, 944 (C.A. 6); or that the employer was "completely impartial in all its dealings with respective parties" (*N.L.R.B. v. Indianapolis Newspapers, Inc.*, *supra*, at 504). However, the case at hand fails to present such factors. Here, after expressing his preference for Local 33, Cabral signed the contract within 30 hours from the time the authorization cards were solicited, with no attempt to verify that Local 33 was the employees' choice, and despite the evidence that Cannery Workers had a strong claim on their allegiance.

The circumstances of this case, therefore, present a situation where application of the principles under discussion is needed. Surely it would not have been an onerous burden for the employer in this instance to have called into play the statutory election machinery. As the Fifth Circuit recognized in *N.L.R.B. v. Signal Oil and Gas Co.*, *supra*, 303 F.2d at 788, n. 3;

An employer who is faced by rival claims can both protect himself from possible unfair labor practice findings and speedily bring an end to the stalemate in the bargaining process, for Section 9(c)(1) of the Act empowers him to file a petition for an election under such circumstances. Cf. *Brooks v. N.L.R.B.*, 348 U.S. 96, 104; *ILGWU v. N.L.R.B.*, 366 U.S. 731, 739-740. Furthermore, until the Board determines that a question concerning representation does not exist, an employer

faced with “possible legal jeopardy under *Midwest Piping* doctrine” can refuse to bargain with the union without violating its duty to bargain under Section 8(a)(5). *National Carbon Division*, 105 NLRB 441, 443.

Moreover, Cabral could have obtained a quick answer to the representation question, thereby necessitating minimal interference with the bargaining process, by waiving a formal hearing and agreeing to a consent election. Section 9(c)(4); Section 102.62, NLRB Rules and Regulations; Section 101.19, NLRB Statements of Procedure, Series 8.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a decree should issue, enforcing the Board’s order in full.

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MARCEL MALLET-PREVOST,
Assistant General Counsel,

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National Labor Relations Board.

March 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

REPRESENTATIVES AND ELECTIONS

* * *

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

APPENDIX B

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2 withdrawn			
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NO. 22472 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME BYRNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
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JEROME BYRNES,

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BRIEF OF APPELLEE

I

JURISDICTIONAL STATEMENT

Appellant, formerly an investigator in the Alcohol and Tobacco Tax Division of the Internal Revenue Service [hereinafter referred to as ATTD], was indicted by the Federal Grand Jury for the Southern District of California on April 25, 1962, on eight counts: counts one, three, five and seven charged violations of 18 U.S.C. §872, extortion by officers or employees of the United States; counts two, four, six and eight alleged violations of 18 U.S.C. §202, soliciting money by an officer and employee of the United States for the purpose of influencing his official action. The offenses concerned attempts to extort money from one W. David Tallmadge, the subject of an ATTD investigation being

conducted by appellant.

On January 31, 1963, following a trial by jury, appellant was convicted on counts one through five and count seven of the indictment, and acquitted on counts six and eight. A sentence of eighteen months on each count was imposed, the sentences to run concurrently.

This Court affirmed the judgment of conviction in Byrnes v. United States, 327 F.2d 825 (1964). The Supreme Court denied a petition for certiorari, 377 U.S. 970 (1964).

On February 4, 1965, appellant filed a motion for new trial based on newly discovered evidence. The "newly discovered evidence" consisted of a photostat copy of a letter purportedly written by Francis X. Gilmore, deceased supervisor of the Los Angeles office of ATTD, alleging that William G. Simon, an F. B. I. agent who testified at appellant's trial as to a conversation overheard between appellant and W. David Tallmadge, had told him at the time of appellant's arrest that no conversation was overheard. Following a formal hearing on February 15 and 19, 1965, before the Honorable E. Avery Crary, who also presided at appellant's trial, the motion for a new trial was denied. Judge Crary entered a finding that the testimony of William G. Simon was not perjurious.

The judgment denying the motion for a new trial was affirmed by this Court per curiam, 348 F.2d 918(1965), and the Supreme Court denied certiorari, 382 U.S. 977 (1965).

Appellant commenced service of the sentence on June 22,

1964. Sentence has been fully served.

On August 23, 1967, appellant filed a Motion to Vacate, Set Aside and Void Illegal Sentence [C. T. 2]. 1/ Appellee responded with a Motion to Dismiss, filed September 15, 1967 [C. T. 28]. The motion to dismiss was heard by Judge Crary on October 2, 23 and 24, 1967, and granted in a memorandum opinion and order entered November 6, 1967 [C. T. 72]. This appeal then followed.

Jurisdiction of the court below was asserted on the basis of the "All Writs Statute", 28 U. S. C. §1651(a). The appellee contends that the court below lacked jurisdiction, as does this Court, because the questions presented are moot.

II

STATUTES INVOLVED

Section 1651(a) of Title 28, United States Code provides as follows:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. "

1/ "C. T. " refers to Clerk's Transcript.

III

STATEMENT OF FACTS

A. Facts Leading to Appellant's Conviction. 2/

In February, 1962, appellant was assigned by the Los Angeles Alcohol Tobacco Tax Division Office to investigate possible violations of the Federal Firearms Act by W. David Tallmadge. In the course of this investigation, appellant attempted to obtain \$25,000 from Tallmadge in return for arranging to have the investigation disposed of without criminal prosecution. Threats were made that Tallmadge and his family would be in serious physical jeopardy if Tallmadge did not cooperate.

Appellant's first attempt to extort funds from Tallmadge occurred during an interview in Tallmadge's office on March 7, 1962, when appellant suggested that Tallmadge offer \$10,000 or more to a United States Attorney in order to halt the investigation. As soon as appellant left, Tallmadge called his attorney in Chicago, who in turn contacted the Chicago Alcohol Tobacco Tax Division office. Shortly thereafter, agents of the Los Angeles Alcohol Tobacco Tax Division office were sent to interview Tallmadge. As a result of this interview, the F. B. I. was called into the case.

After further contacts with Tallmadge on March 8 and 11,

2/ This statement of facts is adopted from that set forth in Appellee's Brief in Case No. 19,997 in this Court, the appeal from Appellant's Motion for New Trial.

1962, appellant appeared by previous arrangement at Tallmadge's office at 9:00 a.m. on March 12, where he was to collect the \$25,000. Several F.B.I. agents, including William G. Simon, Special Agent in Charge of the Los Angeles Office, were hiding in Tallmadge's office. Tallmadge told appellant that he had not been able to obtain the money, whereupon appellant led Tallmadge to the bathroom. Appellant stepped in first, put on the light and water faucet and then motioned Tallmadge inside. After Tallmadge entered, appellant closed the door and a conversation ensued. Special Agent Simon went to the bathroom door, and overheard parts of this conversation, including Tallmadge's statement, "I'll get the money," and appellant saying, "Do you know what a strain this is, going through something like this. You promised me you would have it." Simon then opened the door and placed the appellant under arrest.

B. Facts Surrounding Appellant's
Motion for New Trial. 3/

On June 12, 1964, appellant's court-appointed trial counsel received an anonymous envelope in the mail, bearing a San Francisco postmark dated June 11, 1964. The envelope bore no return address, nor any indication of the sender's identity. Inside was a photostated copy of a document purporting to be a

3/ This statement of facts is also adopted from the Appellee's Brief in Case No. 19,997 in this Court, the appeal from Appellant's Motion for New Trial.

letter signed by Francis X. Gilmore, former supervisor of the Los Angeles Alcohol Tobacco Tax Division office who was then deceased. The addressee of the letter had been obliterated.

This letter stated in part:

"Immediately after arresting Byrnes, Simon privately informed me no money had changed hands or was involved. I specifically asked him if there were any witnesses, and he told me Byrnes and Tallmadge had been in a lavatory near Tallmadge's office, and he had put his ear to the door but could not make out what was being said as the voices were garbled."

On the basis of this letter, appellant filed a motion for new trial based upon newly discovered evidence. An investigation was undertaken by the F. B. I. to determine the authenticity of the letter. The matter was heard by Judge Crary on February 15 and 19, 1965. At the hearing, the letter was rejected as evidence. No evidence that Mr. Gilmore had ever prepared, delivered or mailed such a letter was produced. After hearing the testimony of several witnesses, including William G. Simon, the court denied the motion, stating "I don't conclude and I do not believe that Mr. Simon perjured himself."

C. Facts Surrounding Appellant's
Motion to Vacate.

On August 23, 1967, appellant filed a Motion to Vacate, Set Aside and Void his sentence, claiming a denial of his constitutional right to a fair trial on the ground that Norman T. Ollestad, an Assistant United States Attorney at the time of his trial, had knowledge that Simon's testimony was perjurious, but failed to disclose it to the trial court [C. T. 2]. Attached to the motion as "Exhibit A" was an unsigned document entitled "An Open Apology" [C. T. 11], as well as an excerpt from the book, "Inside the F. B. I. ", written by Norman T. Ollestad [C. T. 12-22], both of which appellant claimed to have received in the mail from an anonymous benefactor. Also accompanying the motion was a request for subpoenas duces tecum to be issued for Norman T. Ollestad, as well as two television commentators on whose programs Ollestad had allegedly appeared [C. T. 23].

The respondent moved to dismiss the appellant's motion [C. T. 28], and at the initial hearing of this motion on October 2, 1967, Judge Crary continued the matter three weeks, in order to allow the appellant to either produce an affidavit from Norman T. Ollestad, or to file his own affidavit stating why he was unable to secure an affidavit from Mr. Ollestad [R. T. 21-26]. ^{4/}

On October 16, 1967, appellant filed an affidavit stating he

^{4/} "R. T. " refers to the Reporter's Transcript of Proceedings.

had contacted Mr. Ollestad who initially agreed to give him an affidavit "but stated he was afraid that he would be cut up in little pieces, disbarred and probably prosecuted." At a subsequent meeting, Mr. Ollestad's attorney declined to supply appellant with an affidavit [C. T. 54].

Judge Crary then requested that Mr. Ollestad be subpoenaed to appear as the Court's witness. He appeared on October 23, 1967 [R. T. 41]. Upon examination by the Court, Mr. Ollestad stated he had been an F. B. I. agent for a period of ten months, from November, 1960 to September, 1961 [R. T. 43], after which he served for two years as an Assistant United States Attorney for the Southern District of California [R. T. 41-42]. He began writing "Inside the F. B. I. " sometime in 1964, after leaving the United States Attorney's Office. The book was completed and published in June of 1967 [R. T. 46].

Ollestad admitted that the incidents he described in pages 287 through 295 of his book were, in fact, based upon events surrounding the investigation and trial of the appellant [R. T. 50]. Certain factual changes were made "so it wouldn't cause any undue embarrassment to the principals." [R. T. 154, 159]. A few examples of the factual changes which Mr. Ollestad acknowledged were the following:

1. With the exception of the F. B. I. agent who actually testified, all agents described in the book were fictional characters [R. T. 54, 164];
2. The name of the appellant was changed to Jerry

Hernstein, appellant having been indicted under the name Jerome Bernstein as well as Jerome Byrnes [R. T. 54];

3. The amount of the money sought as a bribe was changed from \$25,000 to \$20,000 [R. T. 153-54];

4. The book describes a microphone being placed in the bathroom, and a conversation in which one agent says to another "Aren't you glad I thought to put the mike in there." In fact, Mr. Ollestad admitted no microphone was in the bathroom, and no such conversation ever took place [R. T. 169, 172];

5. The book describes "Hernstein" and the victim walking to the bathroom "without a word". In fact, there was a brief conversation, recorded on tape [R. T. 173-74];

6. Time intervals surrounding the Gilmore letter were changed. The book states Gilmore died a week after the appellant's conviction, whereas he actually died eleven months later [R. T. 160]. The book states the letter was received by Mr. Byrnes' attorney a few weeks after the trial, whereas it was actually received a year and a half later [R. T. 159].

With respect to the conversations attributed to the F. B. I. Agents in the book, Mr. Ollestad stated they were a distillation of accounts he had heard from disgruntled Treasury Agents, as well as F. B. I. agents complaining about the way the investigation of the case was handled [R. T. 56-57, 75-77]. He could not attribute any of these statements to any particular agents [R. T. 189-90], nor could he attribute any of the things he heard to any agents who participated in the investigation:

"Q. So, Mr. Ollestad, you yourself did not have any factual basis to attribute this statement to one of the agents investigating the case?

"A. Well, I wasn't sure of all the agents who were investigating the case and I didn't know who had made the statement.

"THE COURT: So you just put it in the mouth of somebody who had investigated the case?

"THE WITNESS: Right.

"THE COURT: Without knowing he had actually made the statement or that anybody investigating the case had made the statement?

"THE WITNESS: Yes." [R. T. 199-200].

In short, Mr. Ollestad conceded that the account of the events surrounding the investigation contained in his book merely reflected his conclusion that William Simon committed perjury, a conclusion he reached long after leaving both the F. B. I. and the United States Attorney's Office [R. T. 57, 91]. His incredible account of how he arrived at this conclusion is certainly no credit either to the training he received to become an attorney or to become an F. B. I. Agent. Mr. Ollestad stated he based his conclusion upon the statements he heard from disgruntled agents, corroboration he later found in the court files, and the Gilmore letter [R. T. 66-67].

First, he stated all of the statements and accounts he heard regarding the investigation were of the rankest hearsay

nature [R. T. 99, 115]. Not only were these statements in the nature of complaints by disgruntled agents [R. T. 56, 75], but he was unable to attribute any personal knowledge to any of the agents he spoke to [R. T. 199-200]. Mr. Ollestad could not recall ever having discussed the matter with Mr. Simon [R. T. 81] or other agents who had actually participated in the investigation [R. T. 232-35].

Secondly, the "corroboration" he later found in the court file consisted of an inconsistency between a witness' testimony and the way in which a government attorney paraphrased that testimony in a pleading filed with the court [R. T. 224]. Although the question of whether Mr. Simon's testimony was perjurious had been fully litigated in court proceedings, Mr. Ollestad's "review" of the court record did not include a reading of the transcript of those proceedings [R. T. 149], nor did it include a review of any of the exhibits presented in those proceedings [R. T. 57, 58, 62]. At no time after leaving the U. S. Attorney's Office in November, 1963 did Mr. Ollestad discuss the matter with anyone in that office or the F. B. I. [R. T. 65, 66].

Finally, Mr. Ollestad's conclusion was based upon an assumption that the "Gilmore letter" was a genuine document, written by Francis X. Gilmore [R. T. 155]. In a fascinating display of logic, Mr. Ollestad concluded that the letter must be authentic because the prior investigation which failed to determine its authenticity was, in his opinion, "cursory" [R. T. 68]. He did not recall having even read the affidavit filed on the motion for new

trial relating what investigation of the letter had been made [R. T. 227-29], and stated that he himself conducted no additional investigation of the letter's authenticity [R. T. 157].

Mr. Ollestad was questioned closely as to what official connection he had as an Assistant U. S. Attorney with either the appellant's case or the case involving W. David Tallmadge, whom appellant was investigating. He stated he had nothing to do with the investigation of the appellant's case [R. T. 44, 63, 115]. None of the conversations with agents about which he testified were in any official capacity, all having occurred after the trial of the appellant [R. T. 55-56].

According to the Affidavit of Thomas R. Sheridan, Mr. Ollestad was assigned to evaluate the Tallmadge file and make a recommendation as to prosecution subsequent to February 26, 1963 [C. T. 62]. However, Mr. Ollestad did not recall having handled the matter even when confronted by letters he had composed declining prosecution of the case [R. T. 230], and he stated that he had no specific recollection that because of his handling of the Tallmadge matter he knew anything about appellant's case [R. T. 232].

At the conclusion of Mr. Ollestad's testimony, the matter was taken under submission, with the proviso that an affidavit be filed by the government reflecting when the Tallmadge case was assigned to Ollestad and be considered a part of the evidence [R. T. 310]. An affidavit signed by Thomas R. Sheridan was filed on November 3, 1967 [C. T. 62]. On November 6, 1967, the court

entered a memorandum opinion and order granting the motion to dismiss Appellant's Motion to Vacate, Set Aside and Void the sentence [C.T. 72].

IV

SPECIFICATIONS OF ERRORS

Three questions are presented by this appeal:

- A. Does this Court lack jurisdiction of this appeal because the questions presented are moot?
- B. Did the Court below err in dismissing Appellant's Petition for a Writ of Error Coram Nobis?
- C. Did the Court below commit reversible error in considering the affidavit of Thomas R. Sheridan?

V

ARGUMENT

- A. THIS COURT LACKS JURISDICTION OF THIS APPEAL BECAUSE THE QUESTIONS PRESENTED ARE MOOT.
-

The appellant originally sought relief in the court below on the basis of Rule 35, Federal Rules of Criminal Procedure. The court below correctly concluded that Rule 35 was inapplicable, since "the narrow function of Rule 35 is to permit the correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition

of sentence." Hill v. United States, 368 U.S. 424, 430 (1962); Redfield v. United States, 315 F.2d 76, 81 (9th Cir. 1963).

In the alternative, relief was sought in the form of a Writ of Error Coram Nobis. The court below concluded that petitioner presented a petition in the nature of a Writ of Error Coram Nobis [C.T. 83]. The Writ of Error Coram Nobis, however, does not eliminate the jurisdictional requirement that a case or controversy must be presented before a court has jurisdiction to act; and no case or controversy is presented where the issues one seeks to litigate are moot.

The only sentence imposed upon the defendant was imprisonment for a period of eighteen months on each count, to run concurrently. Appellant commenced service of this sentence on June 22, 1964, and the sentence has now been served in full.

If this were a direct appeal from the conviction, the appeal would be moot. St. Pierre v. United States, 319 U.S. 41 (1943); Williams v. United States, 261 F.2d 224 (9th Cir. 1958), cert. den. 358 U.S. 942. As stated by the Supreme Court in St. Pierre v. United States, supra, at p. 43: "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review."

Cf. Penneywell v. McCarrey, 255 F.2d 735 (9th Cir. 1958); Gillen v. United States, 199 F.2d 454 (9th Cir. 1952); Government of Virgin Islands v. Ferrer, 275 F.2d 497 (3rd Cir. 1922).

Clearly, a justiciable controversy must also be presented upon a petition for relief in the nature of the Writ of Error Coram

Nobis. The writ has been used to attack convictions entailing collateral legal disadvantages which survive the satisfaction of sentence, such as providing the basis for sentencing as a recidivist on a subsequent conviction, United States v. Morgan, 346 U.S. 502 (1954), or barring the exercise of voting rights, United States v. Cariola, 343 F.2d 180 (3rd Cir. 1963), but here the appellant has alleged no such collateral disadvantages. Embarrassment and loss of prestige are "not enough to justify a judicial determination of petitioner's rights. The moral stigma of a judgment which affects no legal rights presents no case or controversy of federal cognizance." United States v. Cariola, supra, at p. 182.

B. THE COURT BELOW DID NOT ERR
IN DISMISSING APPELLANT'S PETITION
FOR A WRIT OF ERROR CORAM NOBIS.

The common law Writ of Error Coram Nobis was exhumed by the Supreme Court in United States v. Morgan, 346 U.S. 502 (1954). There, a state prisoner sentenced as a recidivist sought to vacate a prior federal conviction used by the state as a basis for sentencing him as a "habitual offender". Since the federal sentence had already been served, relief was not available under 28 United States Code, §2255. Moreover, since the ground alleged for invalidity of the prior conviction was denial of right to counsel, the court noted that Rule 35 was inapplicable. However, the court held that the common law Writ of Error Coram Nobis, to correct

errors in the judgment, was still available under the "all writs statute", 28 United States Code, §1651(a). In remanding for a hearing, however, the court warned:

"Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice. "

Since Morgan, the courts have frequently refused resort to this extraordinary remedy, citing the absence of "compelling circumstances". E. g. , Matysek v. United States, 339 F.2d 389, 395 (9th Cir. 1964); Young v. United States, 337 F.2d 753, 756 (5th Cir. 1964).

In dismissing appellant's petition, the court below concluded that compelling circumstances had not been shown because appellant was seeking to relitigate the question of whether Agent Simon gave false testimony at his trials, without presenting anything that would materially affect the results of that prior litigation:

"If Ollestad had reported the information petitioner says he had relative to the alleged conspiracy, it would have been the same as that considered by the court in petitioner's motion for a new trial, to wit, the alleged perjury of F. B. I. Agent Simon in his testimony at the trials of the petitioner. " [C. T. 75-76].

The appellant repeatedly asserted in the court below that he was not seeking to relitigate the issue of whether William Simon's testimony was perjurious [R. T. 13, 294]. Again, in his brief on appeal, appellant argues that the sole issue is whether there was misconduct by Assistant United States Attorney Norman T. Ollestad. But in urging that he was prejudiced by this "misconduct", as indeed he must, he alleges that if Ollestad had made his knowledge known, "Appellant's claim that William Simon had perjured himself would have been completely substantiated." (Appellant's Opening Brief, p. 15). Thus, we return to an issue that was fully litigated at the time of appellant's motion for new trial.

The only "evidence" beyond that presented on the motion for new trial which appellant now claims is that agents stated to Ollestad "that William Simon had in fact directly told them he had not overheard the conversation to which he [Simon] testified to at Appellant's trial." (Appellant's Opening Brief, p. 14). There is no basis in the record for this claim. At no time did Ollestad state that the agents he spoke to had ever even discussed the case with William Simon. Quite to the contrary, he stated he had not discussed this with any of the agents who were actually at the scene of the investigation [R. T. 82], and placed this specific statement in the context of complaints about the particular work-up of the case [R. T. 77]. With respect to appellant's claim that this information would have significantly affected the outcome of his motion for new trial, it should be noted that William Simon testified at the hearing

of appellant's motion for new trial, and was questioned at great length concerning his testimony at the trial, as well as any statements he had made to others regarding what he heard through the bathroom door. In addition, other agents who were present with Mr. Simon at the time of appellant's arrest appeared and testified.

In effect, appellant was seeking to present "newly discovered evidence" after expiration of the time limits expressed in Rule 33, under the guise of a petition for a Writ of Error Coram Nobis. Even if this extraordinary writ were available for such a purpose, the same standards used to evaluate "newly discovered evidence" presented under Rule 33 should be applied in determining if a petitioner can make "a showing so strong that action to achieve justice is compelled." [C. T. 81].

Petitioner's situation is identical to that presented to the Fifth Circuit Court of Appeals in Reid v. United States, 149 F.2d 334 (1945). There, eighteen months after his conviction, the defendant petitioned for a Writ of Error Coram Nobis, alleging that one of the government witnesses at his trial gave perjured testimony. At the time, the Federal Rules required that a motion for new trial on the grounds of newly discovered evidence be filed within sixty days of final judgment. In upholding the summary denial of the petition, the court stated:

"This is in substance a motion for new trial for newly discovered evidence, which under Rule 2(3) for Procedure in Criminal Cases after Verdict, 18 U.S.C.A. following Section 688, must be filed within

sixty days after final judgment, the case not being a capital case. Calling this motion a petition for a writ of error coram nobis does not help it. The corrective powers of the courts touching the truth of the case are exhausted. "

149 F.2d at 335. Similarly, the Sixth Circuit Court of Appeals, in Meredith v. United States, 138 F.2d 772 (1943), held that Coram Nobis was unavailable to attack a judgment on the ground three new witnesses were discovered to show a government witness had given perjured testimony. The court concluded:

"The petition and the record before us, do not show even claimed errors which, of themselves, would render the judgment irregular and invalid. The discovery of new witnesses to sustain proof of perjury would be properly raised before the trial court on motion for a new trial. "

138 F.2d at 773.

Even if the extraordinary Writ of Error Coram Nobis were to be made available as a substitute for a motion for new trial, the "new evidence" proffered should at least meet the standards imposed on a Rule 33 motion. Applying those standards, it is clear the court below did not err in concluding that petitioner did not make a showing so strong that action to achieve justice is compelled [C. T. 81]. These criteria are: (1) it must appear from the motion that the evidence is, in fact, newly discovered; (2) the motion must allege facts from which the court may infer diligence

on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issues involved, and (5) the evidence must be such that on a new trial, would probably produce an acquittal. Beyda v. United States, 324 F.2d 526, 531 (9th Cir. 1963); Pitts v. United States, 269 F.2d 808 (9th Cir. 1959), cert. den. 360 U.S. 919; Bulestreri v. United States, 224 F.2d 915 (9th Cir. 1955); Brandon v. United States, 190 F.2d 175 (9th Cir. 1951).

Certainly, if the "evidence" relied upon is clearly inadmissible, it would not qualify as "newly discovered evidence".

McCroskey v. United States, 339 F.2d 895 (8th Cir. 1965) (results of polygraph test); Saunders v. United States, 192 F.2d 409 (D.C. Cir. 1951) (Police Department Memorandum). Here, the only "evidence" producible would be hearsay; moreover, it is merely cumulative to evidence already presented and rejected, on the motion for new trial.

In asserting that the court below disregarded "the relevant heart of the basic issue," (Appellant's Opening Brief, p. 13), appellant seeks to limit consideration of Ollestad's testimony to three or four passages taken out of context, alleging that "Ollestad's book is irrelevant and immaterial to the issue". Quite to the contrary, the fact that Ollestad took great liberties with the facts, and that he included, as quotations attributed to agents, statements that he admitted were never made [R. T. 169, 172, 199-200] bears directly on the issue of what consideration should be given to his accounts of social conversations with agents. In short, if any

misconduct can be attributed to Norman T. Ollestad, it is his irresponsibility in leveling the serious charge of perjury at another, without making any serious effort himself to ascertain the truth.

C. THE COURT BELOW DID NOT COMMIT
REVERSIBLE ERROR IN CONSIDERING
THE AFFIDAVIT OF THOMAS R.
SHERIDAN.

Appellant, in urging that Norman T. Ollestad was "part of the prosecutive team intimately knowledgeable as to the circumstances of the case against Appellant," (Appellant's Opening Brief, p. 27), stresses the involvement of Ollestad in declining prosecution of the man from whom appellant solicited a bribe. In order to determine exactly when Ollestad did become involved in the Tallmadge case, the court below requested the Assistant United States Attorney to review the file from the Federal Records Center and submit an affidavit as to what the file reflected [R. T. 287-89]. As the Federal Records Center file did not bear a notation showing the date of assignment, it was reviewed by Thomas R. Sheridan, who was Chief of the Criminal Division of the United States Attorney's Office at the time, and whose duties would have included assignment of all criminal cases. Mr. Sheridan signed an affidavit stating that he assigned the file to Mr. Ollestad after receipt of a letter contained in the file, dated February 26, 1963 [C. T. 62].

Appellant's reliance on the "best evidence" rule is misplaced.

Certainly, the sworn testimony of a witness as to when an assignment was made is better evidence than a mere entry on a file to reflect such an assignment. The entry, if made, would have been offered to prove the assignment; instead the assignment was proven by direct evidence. McCormick, Evidence §281 (1954).

In any event, as noted by the court below [R. T. 265], the relevance of when the case was assigned to Ollestad is certainly questionable, in light of Ollestad's testimony that he did not even remember having handled the Tallmadge case [R. T. 230], and his statement that he had no specific recollection that because of the Tallmadge case he knew anything about the Byrnes case [R. T. 132].

In urging Ollestad's connection with his case, appellant has presented, as an appendix to his brief, a certified copy of minutes of the court purporting to show that Norman T. Ollestad appeared for the government at his arraignment. This document was at no time presented to the court below, or even called to its attention. Thus, it is not properly a part of the record on appeal. Rule 75(a), Federal Rules of Civil Procedure; Dictograph Products Co. v. Sonotone Corp., 231 F.2d 867 (2nd Cir. 1956). However, even if Ollestad were present at the time of appellant's arraignment, such presence certainly would not render him "part of the prosecutive team intimately knowledgeable as to the circumstances of the case against Appellant." In the Central District of California, as in the then Southern District, one Assistant United States Attorney is assigned to handle the complete arraignment calendar, frequently comprising as many as 50 arraignments in one day.

VI

CONCLUSION

In the event this Court concludes that the issues presented are not moot, a review of the record reveals the court below did not err in concluding that appellant could not make a showing that would justify the granting of a Writ of Error Coram Nobis. Therefore, the appellee respectfully prays that the judgment of the court below be affirmed.

Respectfully submitted,

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United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
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Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen

GERALD F. UELMEN

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

--oOo--

CLARENCE E. MATTOS, SR., and
CLARA MATTOS,

Appellants,

vs.

UNITED STATES OF AMERICA,
JOHN J. VAUGHN, NEWTON WAKEMAN,
WILLIAM HICKEY, CAPTAIN TUCKER,
DOE I THROUGH DOE XI,

Respondents,

FILED 3-23-87

FILED

APR 1 1987

WM B. LUCH (LEW)

APPELLANTS' BRIEF

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2680

6

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

--oOo--

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CLARA MATTOS,)
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JOHN J. VAUGHN, NEWTON WAKEMAN,)
WILLIAM HICKEY, CAPTAIN TUCKER,)
DOE I THROUGH DOE XI,)
)
Respondents.)

CIVIL: S-66-37

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of California entering an Order of Dismissal in favor of all the defendants and against the plaintiffs therein (and Appellants herein). The effect of such dismissal before trial on the merits was to prevent the plaintiffs from bringing suit against any person in either Federal Court or State Court for the wrongful death of their son. The further effect of such Order of Dismissal was to hold that appellants, as a matter of law, could not plead nor prove a cause of action against any of the defendants.

This action was commenced in the Superior Court of the State of California in and for the County of Sacramento as action No. 169709.

This action was removed upon motion of the respondent. United States, to the United States District Court for the Eastern District of California pursuant to Title 28 U.S.C. section 2679(d), on the grounds that

(a) the plaintiffs sought judgment for damages resulting from the negligent operation of a motor vehicle by defendant JOHN J. VAUGHN; (b) at the time of the alleged accident, defendant JOHN J. VAUGHN was acting within the scope of his employment as an employee of the United States; (c) the exclusive remedy by suit available to the plaintiffs within the meaning of Title 28 U.S.C. section 2679 (b) is against the United States; (d) the United States District Courts have original jurisdiction of such actions against the United States pursuant to Title 28 U.S.C. section 1346(b); (e) and a removal was also proper pursuant to Title 28 U.S.C. section 1442 (a) for the reason that plaintiffs seek judgment against defendants NEWTON WAKEMAN, WILLIAM HICKEY, G. B. TUCKER, and JOHN J. VAUGHN, on account of acts or omissions allegedly done under the color of their status as members of the armed forces of the United States. The United States was subsequently substituted for JOHN J. VAUGHN as a defendant to the action pursuant to Title 28 U.S.C. section 2679 (b). At this point, the posture of the suit was that the plaintiffs were suing the defendants under the provisions of the Federal Tort Claims Act.

Thereupon, the United States moved for dismissal in favor of itself on the basis of the Feres Case. (Feres vs. United States, 340 U.S. 135, 1950.) A motion was granted on the grounds that the Feres Case was a judicially created exception to the direct statutory language of the Federal Tort Claims Act. (Said act permitting persons injured by Federal employees to bring suit against the United States.)

The United States also moved for dismissal against the remaining defendants WAKEMAN, HICKEY, TUCKER (and in effect, VAUGHN) on the grounds that since the alleged negligence was committed while they were employees of the United States on reserve military training exercises,

that such Federal employees were totally exempt from suit, either in Federal Court or State Court. The District Court granted both motions thereby denying the plaintiff a cause of action against the United States under the Federal Tort Claims Act and also preventing the plaintiffs, once the United States was dismissed from the case, from remanding the case to the State Court for suit against VAUGHN and/or the other defendants.

Plaintiffs down below and appellants herein, filed timely notice for appeal and the case is properly before this court.

STATEMENT OF FACTS

This is a wrongful death suit brought by CLARENCE E. MATTOS, SR., and CLARA MATTOS, the parents of their deceased son, CLARENCE E. MATTOS, JR. (hereafter CLARENCE MATTOS).

CLARENCE MATTOS was a member of the Marine Corps Reserves. Several months prior to the fatal accident on June 4, 1966, he had finished his active duty service with the Marine Corps. On June 4, 1966, he was participating in a Marine Corps Reserve training exercise as a "weekend warrior". He participated in reserve training activities one weekend a month but was otherwise a civilian citizen.

At the time of the accident, in which CLARENCE MATTOS was killed, a fellow reservist, JOHN VAUGHN, was driving, and CLARENCE MATTOS was riding, in a two and one-half ton, six by six M-35 truck belonging to their reserve unit. Both were members of the "Drivers Training Platoon" of said reserve unit. The driver, JOHN VAUGHN, was a minor, under the age of 21 years.

On the day of the fatal accident, both were participating in a driver training exercise. The truck in which the deceased was riding was

the last in a convoy. The truck, while rounding a curve on a public highway, at a dangerous and excessive speed, was caused to leave the road and turn over causing the death of CLARENCE MATTOS, a passenger. CAPTAIN NEWTON WAKEMAN was the Commanding Officer of the above-mentioned reserve unit, LT. WILLIAM HICKEY was the Platoon Commander of the Drivers Training Platoon of the above-described reserve unit, and CAPTAIN TUCKER was the Inspector-Instructor of said reserve unit.

As a result of this accident, the plaintiffs filed suit alleging inter alia that the driver wilfully and wantonly operated said vehicle; that with wilful and wanton disregard for the safety of the deceased and other persons, the defendants supervised and entrusted said vehicle to the minor driver. Plaintiffs also sued Doe V and Doe VI as the parents of minor driver VAUGHN, said parents having signed VAUGHN's driver license application and responsible under Chapter 2 of Division 9 of California Vehicle Code.

As a result of the dismissal below, the plaintiffs have been prevented, as a matter of law, from introducing evidence to support said allegations.

SPECIFICATION OF ERRORS RULED ON

1. The District Court erred in its Order dismissing the defendant UNITED STATES from the action of erroneously ruled that the Feres Case exception to the Federal Tort Claims Act should be extended to weekend reservists.

2. The District Court erred in its Order dismissing as to the other remaining defendants and erroneously ruled that weekend reservists are totally exempt from suit for their negligence or wilful and wanton misconduct if such misconduct was perpetrated while on weekend reserve activities. See Memorandum and Order pages 42-45 of Transcript of Record;

QUESTIONS PRESENTED

1. Whether the Feres Case exception to the Federal Tort Claims Act, which case provided that the United States cannot be liable under the Federal Tort Claims Act for injuries to servicemen arising from activities incident to military service involving regular members of the armed services --- should be extended to weekend reservists.

2. Whether under Federal Law, weekend reservists, have total immunity from being sued for their negligent or wilful and wanton infliction of injury on fellow reserve members.

ARGUMENT

I. THE FERES CASE EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DEALING WITH REGULAR MEMBERS OF THE ARMED SERVICES, SHOULD NOT BE EXTENDED TO WEEKEND RESERVISTS.

The older rule, born and nurtured in antiquity was that "you cannot sue the Sovereign". For a long period, the United States Government was shielded by this doctrine of sovereign immunity and resulted in what Justice Frankfurter once described as a "privileged position" of "legal irresponsibility" for tort. Thus shielded by sovereign immunity, the United States was under no legal obligation whatever to respond in damages to anyone who sustained injury or loss through the tortious conduct of its employees.

This era of "irresponsibility" ended in 1946 by the enactment by Congress of the Federal Tort Claims Act. This act provided a comprehensive remedy against the United States for personal injury, death, or property damage, resulting from the torts of Federal employees. The Act has a

section which lists types of claims that are excluded, Title 28 U.S.C. section 2680. No exclusion is provided exempting the United States from suit for injuries or death of servicemen arising out of, or in the course of, activity incident to military service.

The Feres Case (Feres vs. United States, 340 U.S. 135, 1950) judicially created such an exception by holding that the United States could not be sued under the Federal Tort Claims Act by a regular member of the armed services who suffered death or injury arising out of activity incident to military service. Appellant argues that the Feres Rule is a judicially created exception to the apparently absolute language of the Federal Tort Claims Act (See Title 28, U.S.C. section 1346 (b)) and as such should be limited to regular members of the armed forces.

And no cases have been found extending the Feres Rule directly to reservists injured or killed by fellow reservists while participating in weekend drill. The opinion in Drumgoole vs. Virginia Electric & Power Company, 170 F. Supp. 824 (1959), which was cited below by the United States does state that the Feres Rule "includes the enlisted reserve when in training" (page 825), but it does so without any discussion whatever, and without any indication as to whether the claimant there was engaged in weekend training as opposed to prolonged (i.e. six months) training. The opinion, therefore, is not persuasive authority for present purposes. Moreover, the policy underlying the Feres Rule, to-wit, "the necessity of maintaining military discipline", has little or no pertinence to claims for injuries to weekend reservists. Surely, the need for maintaining discipline among the civilian members of a weekend reserve unit is not sufficiently compelling, and the threat of a breakdown of such discipline is not a sufficiently serious evil, to warrant leaving plaintiffs without a

remedy for the death of their son. It hardly seems likely (or even remotely possible) that the litigation of such a claim such as the present one, will "reduce the armed forces of the nation to a rabble dangerous to their friends and harmless to their enemies". (Defendants' motion, page 26 of Transcript of Record.) The situation of a weekend reservist bears no similarity, for present purposes, to that of his regular counterpart, who is in day to day contact with his superiors, and who, in fact, might cause undue disruption of military discipline if he were free to litigate claims against them.

In O'Brien vs. United States, 192 F. 2d 948 (1951) cited below by the United States, the deceased was killed while in the process of getting ready to take an airplane ride. This ride was requested by the deceased and was permitted as part of indoctrination upon joining the reserve unit. None of the facts indicate that the deceased was participating in reserve drill activities. Without discussion of the weekend reserve issue the court relied on the Feres Case as the basis for the dismissal against the United States, appellant contending that such reliance constituted an unwise and inadequately considered extension of the Feres Doctrine.

In United States vs. Carroll, 369 F. 2d 618 (1966) cited below by the United States, the deceased was not on weekend reserve duty at the time of death, but was killed while riding in a Government airplane. Furthermore, the deceased was not killed by a fellow weekend reservists but rather by a pilot on active duty. Moreover, the Carroll Case relied on the cases previously considered and mentioned above which cases constitute unwarranted extensions of the Feres doctrine which, initially, only involved regular members of the armed services.

The Federal Tort Claims Act was enacted by Congress to ameliorate the harsh and inhuman doctrine of sovereign immunity. The Feres Case was a judicially created exception to the direct language of the Federal Tort Claims Act and was limited to regular members of the armed services. Although the Supreme Court has not ruled on this precise issue, there do appear to be cases as mentioned which seem by indirection or dicta to extend the exclusion to injuries to and by weekend reservists. As more and more of the civilian citizens of the United States are requested or volunteer to serve in their country's defense by participating as reservists, where they set aside occasional weekends for this purpose, it is clear that a further extension and creeping of the Feres Doctrine to include them takes on serious implications beyond that contained in the original Feres decision. Each unwise and unwarranted extension of the Feres case brings us ever closer to a return of sovereign immunity, the harshness of which prompted the enactment of the Federal Tort Claims Act. The rights of citizens to sue the United States Government should not be abridged by casual or careless extensions of immunity, particularly where they appear to be judicially created in the face of the absolute language of the Federal Tort Claims Act. (Title 28 U.S.C. 2679 (d), Title 28 U.S.C. Section 1346 (b)).

If this MATTOS decision is permitted to stand as rendered in the court below, it means that weekend reservists who are injured cannot seek redress against the Government by Court process. This tends to make weekend reservists "second class citizens" and judicially disadvantage by virtue of their service in the reserves, thus adding further hazards and disadvantages to reserve service.

II. WHEN THE UNITED STATES IS SUBSTITUTED FOR A DEFENDANT UNDER THE FEDERAL TORT CLAIMS ACT, AND THEREAFTER THE UNITED STATES APPROPRIATELY MOVES FOR DISMISSAL

OF ITSELF UNDER THE FERES IMMUNITY DOCTRINE, THE COURT SHOULD NOT DISMISS AS TO ALL THE FEDERAL EMPLOYEE DEFENDANTS, BUT SHOULD RATHER REMAND THE CASE PURSUANT TO TITLE 28 U.S.C. 2679 (d).

The United States having removed this case to the District Court, thereupon made a motion to have itself substituted for the defendant driver VAUGHN. (See pages 17-19 Transcript of Record). The United States relied upon Title 28 U.S.C. section 2679 (b), which provides as follows: (emphasis added)

"The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or emission gave rise to the claim." (See Appendix I)

The exclusiveness of that section permitting substitution is premised upon there being a remedy for the plaintiff under the Federal Tort Claims Act. If in fact there is no remedy thereunder (because of the Feres Doctrine amendment thereto), then that section does not provide for exclusiveness.

In effect, the United States told plaintiffs "you cannot sue VAUGHN because you have a remedy against me". After substitution then the United States said "I am sorry, you don't really have a remedy against me because of the Feres Rule, so let's dismiss the whole case."

The Court below in dismissing as to all defendants granted them that which the court frankly characterized as "immunity". (See page 43, line 19 of Transcript of Record.) The court relied upon Bailey vs. Van Buskirk, 345 F. 2d 299 (1965). The case is not persuasive authority for such a momentous proposition.

The relationship between CLARENCE MATTOS and JOHN VAUGHN

was not the relationship of a subordinate to his superior as in the Bailey case, but, rather, they were fellow weekend reservists of the same rank. (See page 28 lines 30 and 31 of Transcript of Record.) Furthermore, the Bailey case did not involve a consideration of the exclusiveness provisions of Title 28 U.S.C. section 2679 (b) nor the question of remand under 2679 (d). Moreover, the Bailey Case without reasoned consideration, relied on the Feres Case. The Feres Rule was that a serviceman cannot sue the United States Government. It does not stand for the proposition that a weekend reservist is immune from suit himself individually in both Federal and State Court for the wilful and wanton or negligent causing of the death of another. If in fact, weekend reservists were totally immune from suit, the United States below could have so argued and moved for dismissal directly without going through the motion of having itself substituted for defendant VAUGHN. The United States is attempting to, by indirection, that which it has no authority to do directly.

If the plaintiffs had a remedy against the United States, the United States should not have been dismissed as a party. If the plaintiffs did not have a remedy against the United States, then the United States should not have been substituted for the defendant driver VAUGHN.

The United States was substituted under Title 28, section 2679 (b). If the United States should later be dismissed, the District Court should have remanded the case to State Court. The clear and unequivocal language of section 2679 (d) provides: (emphasis added).

"Upon certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State Court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States for the District and Division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this Title and all references

thereto. Should the United States District Court determine on a hearing on a motion to remand held before a trial on the merits, that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State Court."

Once the District Court invoked the Feres Immunity Rule in favor of the United States, then it became clear in the words of the aforementioned section that the case was "one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States ...". At that point, the court should have remanded the action in accordance with the above cited section.

This problem was considered in Tavolieri vs. Allain, 222 F. Supp. 756 (1963). In this case, plaintiff brought suit in the State Court for injuries caused by Government employee negligently driving a motor vehicle while in the course and scope of employment. The United States removed the case to the Federal Court under Title 28, U.S.C. 2679 (b) on the grounds that the plaintiff had a remedy against the United States under the Federal Tort Claims Act. It later appeared that the plaintiff did not have a remedy under section 2679 (b) and the court remanded the case in accordance with section 2679(d).

The court reasoned on page 759 of the Opinion: (emphasis added)

"Suppose, for example, that the pleadings in the State Court and the removal papers show that plaintiff's damage was caused by the operation of a motor vehicle by an employee of the Government while acting within the scope of his employment, but the pleading did not reveal, what would be revealed by extrinsic evidence, that the Government employee and plaintiff were in the military service and the injuries arose out of activity incident to service. In such a case, plaintiff would not have a remedy available under section 1346 (b) or any other provision of the Federal Tort Claims Act. Feres vs. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152. The removal would have been improper; and not to permit remand would cause plaintiff to lose his opportunity to sue the employee personally."

Many decisions have held that where a case is removed on the

basis of section 2679(b) and it later appears that the plaintiff does not have a remedy against the United States under the Federal Tort Claims Act, that the case should be remanded under section 2679(d). See Adams vs. Jackel, 220 F. Supp. 764 (1963), Atnip vs. United States, 245 F. Supp. 386 (1965), Jarrell vs. Gordy, 162 So. 2d 577 (1964). In the Jarrell Case, the court held that where a claim is asserted in a State Court against a Federal employee for the negligent operation of a motor vehicle, such employee does not become immune to liability under section 2679(b) unless and until the United States accepts responsibility for the employee's conduct.

CONCLUSION

Again, we return to the simple proposition which requires reversal in this case, and that is, if the plaintiffs had a remedy against the United States under the Federal Tort Claims Act, the United States should not have been dismissed as a party. And, if the plaintiffs did not have such a remedy against the United States, then the United States should not have been substituted for the driver VAUGHN, and the United States should not have been successful in removing the case to the Federal Court upon such a representation that there was such a remedy. Once the lower court determined that there was no remedy for the plaintiff under the Federal Torts Claims Act, it had no jurisdiction to enter a dismissal but should have remanded to the State Courts in accordance with the clear and unequivocal language of the latter part of section 2679(d). In conclusion, appellants argue (1) that the United States should still be a party under the Federal Tort Claims Act since the Feres Decision should not be extended to give the United States immunity from suit under such Federal Tort Claims Act; and, in the alternative,

(2) if the United States is dismissed because the plaintiff has no remedy against the United States, then the Federal Court has jurisdiction only to remand the case to the State Court as previously stated.

Respectfully submitted,

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By _____
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APPENDIX I

APPENDIX I

Section 2679(b) of Title 28 U.S.C. was amended July 18, 1966. Pub. L. 89-506 section 5(a), 80 Stat. 307. Section 10 of Pub. L. 89-506 provided that: "This act (amending section 2679(b)) shall apply to claims accruing six months or more after the date of its enactment."

As amended section 2679(b) reads as follows:

"The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or emission gave rise to the claim."

The inclusion of section 2672 into this section 2679(b) providing for exclusiveness of remedy, does not materially affect the rights of the parties in this action.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE E. MATTOS, SR., and
CLARA MATTOS,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
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CLARENCE E. MATTOS, SR., and
CLARA MATTOS,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This action was originally brought in the Superior Court of the State of California (Sacramento County), against the individual respondents. It was removed to the district court under 28 U.S.C. 2679 and 28 U.S.C. 1442(a). The United States was substituted as a defendant for John J. Vaughn under 28 U.S.C. 2679(b). The district court dismissed the complaint. This court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Plaintiffs sue for the death of their son, Clarence Mattos. He was a member of the Marine Corps Reserve, with the rank of Private First Class, attached to the Motor Transport Maintenance Company, Maintenance Battalion, 4th Force Service Regiment. (R. 28-29). While on weekend training, he was riding as a passenger in a 2 1/2 ton M-35 truck. Both PFC Mattos and the driver, PFC Vaughn, were in the truck in the performance of their military duties in the Drivers' Training Platoon, a part of their unit. Ibid. The truck was the last in a convoy; while rounding a curve at an allegedly excessive rate of speed, it overturned, killing PFC Mattos. (R. 8; see Appellants' Brief pp. 3-4). This suit was brought in the Superior Court for the County of Sacramento against PFC Vaughn, who was driving the truck when it overturned; Captain Wakeman, Commanding Officer of the Motor Transport Maintenance Company; Captain Tucker, Inspector-Instructor of the Motor Transport Maintenance Company; and Lt. Hickey, Commander of the Drivers' Training Platoon. (R. 29).

On petition filed by the United States Attorney, the case was removed to the United States District Court. (R. 1). Two statutes were invoked as a basis for removal: 28 U.S.C. 1442(a) and 28 U.S.C. 2679. 28 U.S.C. 1442(a) provides for removal of actions against officers of the United States for acts done under color of office. 28 U.S.C. 2679 provides for removal of civil actions against Government employees on account of operation of

ny motor vehicle in the course of employment. The latter statute, known as the "Government Drivers Act", also provides for substitution of the United States as defendant upon certification that the defendant employee was acting within the scope of his employment. 28 U.S.C. 2679(d). In accordance with this statute, the United States was substituted for the defendant FC Vaughn. (R. 21-22).

The district court then dismissed the complaint. (R. 46). As to the United States, the court ruled that the case was covered by Feres v. United States, 340 U.S. 135 (1950). That case held that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen arising from activity incident to military service. The district court rejected plaintiffs' argument that Feres should not be applied to reservists while on weekend training (R. 44):

I agree with defendants that the compelling necessity for military discipline is required in any military unit which is expected to function as such, especially while its members are in training. Thus, I do not believe the distinction that plaintiffs would have me draw between regulars and reservists is a viable one.

As to the individual defendants, the district court dismissed on the authority of this Court's decision in Bailey v. Van Hook, 345 F. 2d 298 (9th Cir. 1965), certiorari denied, 383 U.S. 948, which held that "one soldier may [not] sue another for negligent acts performed in the line of duty." 345 F. 2d at 298.

STATUTES INVOLVED

28 U.S.C. 1442(a), provides in relevant part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * *

The Government Drivers Act, 28 U.S.C. 2679(b)-(e), provides in relevant part:

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

* * * *

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under

the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

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ARGUMENT

Summary

1. Dismissal of the suit as to the United States was required by Feres v. United States, 340 U.S. 135. That case held that a suit does not lie against the United States on account of the injury or death of a soldier arising out of activity incident to service. Feres covers reservists while they are engaged in military training. The Marine Corps Reserve is a military organization, and while engaged in military training it has as great a need for discipline as the regular Marine Corps. Moreover, the compensation benefits payable with respect to injury or death of Marine Corps Reservists are identical to those payable in the case of regular members of the Marine Corps.
2. Dismissal of the suit was also proper as to the individual defendants. It has long been the rule that a soldier may not be sued for injury negligently inflicted on another soldier in the course of duty. As this Court pointed out in Bailey v. Van Hook, 245 F. 2d 298 (1965), certiorari denied, 383 U.S. 948, the same considerations of policy which precluded suit in Feres apply where the individual soldier is sued. Nor does this rule

apply only to soldiers superior in rank to the injured soldier. All soldiers, regardless of rank, are governed by military order and subject to military discipline. Their responsibility is to the military authorities, rather than to the civil courts, for negligent conduct which injures another soldier. Thus dismissal was proper as to PFC Vaughn as well as the other individual defendants, even though PFC Vaughn did not outrank PFC Mattos.

3. The district court had jurisdiction to decide the case on the merits as to PFC Vaughn. Even if the Government Drivers Act would require a remand to the State court absent any other basis for federal jurisdiction, where the remedy against the United States is precluded by Feres (and we show in Point IV that the Government Drivers Act does not so require), federal jurisdiction here was sustainable under 28 U.S.C. 1442(a). That statute provides for removal of suits against federal officers for acts under color of office. It clearly covers the claims made here against PFC Vaughn's superior officers. And while the application of the statute to PFC Vaughn himself might be doubtful were he the only defendant, this Court has held that where removal is sustainable under 28 U.S.C. 1442(a) as to some defendants, federal jurisdiction may be exercised as to all defendants, even where no basis for federal jurisdiction other than Section 1442(a) exists. Murphy v. Kodz, 351 F. 2d 163 (1965).

4. Finally, the Government Drivers Act itself required the district court to dismiss the case as to PFC Vaughn, once it was conceded that he was acting within the scope of his

Government employment. That Act was designed to protect Government drivers from suits and from the expense of liability insurance for driving in the course of their employment. It achieved this purpose by remitting the injured party to suit against the United States wherever the Government driver was acting within the scope of his employment. The protection which the Act affords to the Government driver is not lost if, for some reason not relating to the scope of employment issue, the plaintiff is unable to obtain a recovery under the Tort Claims Act. For the Drivers Act does not guarantee the plaintiff recovery under the Tort Claims Act; it merely provides that suit under the Tort Claims Act is the only remedy which the plaintiff may pursue.

I

THE FERES CASE RENDERS THE UNITED STATES IMMUNE FROM SUIT UNDER THE TORT CLAIMS ACT FOR INJURIES SUSTAINED BY RESERVISTS PARTICIPATING IN MILITARY TRAINING, INCLUDING WEEKEND DRILLS.

In Feres v. United States, 340 U.S. 135, the Supreme Court held that the United States is not liable under the Federal Tort Claims Act for the death or injury of soldiers arising out of activity "incident to service." Although the facts of Feres involved regular soldiers, the case clearly applies also to reserve components of the Armed Forces. The purpose of military reserve components, including the Marine Corps Reserve, is "to provide trained units and qualified persons available for active duty in the armed forces in time of war or national emergency * * *." 10 U.S.C. 262. Indeed, the

Marine Corps Reserve is defined by law to be part of the Marine Corps. 10 U.S.C. 5001(a)(2). Thus the district court correctly concluded that the Marine Corps Reserve is a military organization and that Marine Corps Reservists, while in military training are in a military status -- a status held in Feres to be inconsistent with suits under the Federal Tort Claims Act. As the district court pointed out, "military discipline is required in any military unit which is expected to function as such, especially while its members are in training." (R. 44). The fact that reservists spend most of their time in civilian life does not detract from the need for military discipline while the reserve unit is in training.

It is also important to note that the same administrative compensation benefits are payable in cases of injury or death sustained by Marine Corps Reservists, as in cases involving regular members of the Marine Corps. These benefits are payable regardless of whether the training is for six months, two weeks, or a weekend. The compensation statute provides:

A member of the * * * Marine Corps Reserve * * * who is ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty while so employed, or the beneficiary of such a member who dies from such an injury, is entitled to the same pension, compensation, death gratuity, and hospitalization benefits as are provided by law or regulation in the case of a member of the * * * Regular Marine Corps of the same grade and length of service.

10 U.S.C. 6148(a). This statute expressly rejects the distinction which appellants seek to draw between short and long periods of

raining: for purposes of compensation benefits, a Marine Corps Reservist ordered to active or inactive duty training "for any period of time" is entitled to the same benefits as a regular, and the same death benefits are payable to his survivors. ^{1/}

In short, from the standpoint of both military discipline and the availability of administrative compensation benefits, Marine Corps Reservists are plainly within the Feres decision. ^{2/} Moreover, the cases are unanimous in holding reservists to be covered by Feres while attending weekend or evening drills. Thus in O'Brien v. United States, 192 F. 2d 948 (8th Cir. 1951), a man who had just joined a Naval Reserve unit was killed on a flight taken as part of his indoctrination, during a weekend drill. And in United States v. Carroll, 369 F. 2d 618 (8th Cir. 1966), a Naval Reservist was injured while riding to a weekend

/ The statute does draw a time distinction with respect to disability resulting from a disease: in such a case, administrative benefits are payable only if the reservist is on a period of duty of 30 days or more. 10 U.S.C. 6148(b).

/ The Feres decision itself laid heavy stress on the availability of administrative compensation (340 U.S. at 144-46), and did not discuss military discipline. In Johansen v. United States, 43 U.S. 427, 440, the Court stated: "This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. United States." See also Patterson v. United States, 359 U.S. 495, and United States v. Demko, 385 U.S. 149. However, in United States v. Brown, 348 U.S. 110, 112, the Court stated that Feres was based on the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."

drill on a military aircraft. In both cases Feres was applied even though the reservist was not actually participating in military training when the accident occurred; in the present case, where PFC Mattos was actually engaged in military training, the necessity for applying Feres is even clearer. The present case is in all respects similar to Layne v. United States, 295 F. 2d 433 (7th Cir. 1961), where Feres was applied to preclude recovery for the death of an Air National Guard pilot while on a training flight. See also Drumgoole v. Virginia Electric & Power Company, 170 F. Supp. 824, 825 (E. D. Va. 1959), where the court held that Feres applies to "the enlisted reserve when in training." ^{3/}

The foregoing establishes that the case was properly dismissed as to the United States. We now show that dismissal as to the individual defendants was also required.

3/ Drumgoole involved reservists injured while on active duty training. They sued the Power Company, which in turn impleaded the United States. The district court dismissed the third-party complaint on the ground that, under Feres, the United States could not be held liable to the original plaintiffs, and thus could not be held liable to the Power Company for contribution or indemnity.

II.

INDIVIDUAL SOLDIERS ARE ALSO IMMUNE FROM SUIT ON ACCOUNT OF INJURIES SUSTAINED BY OTHER SOLDIERS IN THE COURSE OF ACTIVE DUTY.

All the individual defendants -- including PFC Vaughn, the driver of the truck -- are also immune from suit on account of PFC Mattos' death. As this Court held in Bailey v. Van Buskirk, 445 F. 2d 298 (1965), certiorari denied, 383 U.S. 948, "It is not yet within the American legal concept that one soldier may sue another for negligent acts performed in the line of duty." 345 F. 2d at 298. The Third Circuit has reached the same conclusion. Bailey v. DeQuevedo, 375 F. 2d 72 (1967), certiorari denied, 389 U.S. 923. 4/ The California courts also prohibit suits by one soldier against another for negligent acts in the course of duty. Curnutt v. Holk, 230 Cal. App. 2d 580, 41 Cal. Rptr. 174 (2d Dist. 1964). 5/ The principle of these cases dates back to Johnstone v. Sutton, 1 T.R. 492, 99 Eng. Rep. 1215 (1786), where Lord Mansfield expressed concern lest allowance of an action for malicious prosecution by a naval officer against his

4/ The Third Circuit case involved the same facts as the Ninth Circuit decision, but with a different defendant (the plaintiff had obtained service over only one of the two Army surgeons involved in California, and thus brought a separate suit against the other surgeon in Pennsylvania). The Third Circuit decided the case on the merits, without reaching the defendant's contention that the judgment in the Ninth Circuit case was res judicata. 375 F. 2d at 74.

5/ In Curnutt v. Holk, a group of Air Force personnel were hunting on the base runway, pursuant to orders to clear the runway of deer, which were a hazard to aircraft. Defendant negligently discharged his shotgun while picking it up, injuring plaintiff. The District Court of Appeal stated that "under the facts alleged in the complaint a cause of action would be stated against the defendant were the parties civilians engaged in a hunting expedition." 230 Cal. App. 2d at 584, 41 Cal. Rptr. 176. Nevertheless, the court held that recovery was precluded by the military status of the parties.

commander would lead to judicial intrusion into the military, reducing the armed forces of the nation to a "rabble, dangerous to their friends, and harmless to their enemies." And the Feres case itself supports an immunity for the individual soldiers involved: as Chief Judge Chambers observed in Bailey v. Van Buskirk, supra, "the same policy considerations govern here." 345 F. 2d at 298. ^{6/}

The immunity of an individual soldier for injury inflicted on another soldier in the course of military duty is not confined to suits by subordinates against their superiors in rank. Thus the immunity here protects PFC Vaughn, as well as the other individual defendants who were superior in rank to PFC Mattos. For example, in Curnutt v. Holk, supra, the injured party was a Lieutenant Colonel while the defendant was a Captain; the California District Court of Appeal nevertheless held that the military status of the parties precluded suit for injury sustained in the course of military duty. And while in Bailey v. Van Buskirk

^{6/} The Feres rule applies in cases where the plaintiffs are the survivors of a deceased soldier, rather than the soldier himself. Van Sickle v. United States, 285 F. 2d 87 (9th Cir., 1962). Indeed, Feres itself involved a suit for wrongful death brought by an executrix. Since "the same policy considerations govern" where the individual soldier is sued, the result is not changed by the fact that the plaintiffs here are PFC Mattos' survivors.

supra, and Bailey v. DeQuevedo, supra, the injured party was a sergeant and the defendants a Colonel and a Captain, the result could hardly have been affected if the injured party had been a Colonel, or if the defendants had been medical technicians with enlisted rank, rather than doctors with officer rank. There are many cases in which Feres has been applied even though the relative rank of the individual tortfeasor and the victim does not appear; 7/ indeed, Feres has been applied where the alleged individual tortfeasors were civilian employees of the Government. 8 Clearly, the relative rank of the victim and the individual tortfeasor has not been thought relevant in applying Feres. Hence, as this Court stated in Bailey v. Van Buskirk, supra, the same policy considerations govern here as in Feres, the rank of the individual tortfeasors should also be deemed irrelevant.

/ In Griggs v. United States, one of the three cases decided in the Feres opinion, plaintiff's decedent was a Lieutenant Colonel; the record does not reveal what rank the individual tortfeasors held. See Griggs v. United States, 178 F. 2d 1 (10th Cir. 1949). In several other cases in which Feres has been applied, the relative rank of the victim and the individual tortfeasor does not appear. Zoula v. United States, 217 F. 2d 1 (5th Cir. 1954); Orken v. United States, 239 F. 2d 850 (6th Cir. 1956); United States v. United Services Automobile Ass'n, 38 F. 2d 364 (8th Cir. 1956).

/ Layne v. United States, 295 F. 2d 433 (7th Cir. 1961). In that case, plaintiff's decedent was a Major; his death was allegedly due to civilian control tower operators.

The reasons for the military immunity apply with equal force to PFC Vaughn as well as to Captains Wakeman and Tucker and Lt. Hickey. PFC Vaughn was driving the last truck in the convoy as part of a drivers' training exercise engaged in by his platoon. (R. 8, 28-29, Appellants' Brief, pp. 3-4). Thus PFC Vaughn's presence behind the wheel, the degree of preparation he had before assuming the task of driving the truck, and the speed at which the convoy was traveling -- all these vital matters were subject to military command, and were basically a military responsibility. PFC Vaughn's duty was owed to his superiors, not to PFC Mattos. Individual civil liability would be justified only if PFC Vaughn were in the position of individually deciding whether he had sufficient training to drive the truck on a public highway with passengers, and what speed he should maintain as the last truck in the convoy. Yet clearly PFC Vaughn was acting under orders, and to the extent that these orders left him any discretion, he was accountable to his superiors rather than to his individual passengers.

It should also be noted that the amount of administrative compensation that appellants may be entitled to under 10 U.S.C. 148 depends in no way on the rank of the individual tortfeasor. The observation made by Chief Judge Chambers in Bailey v. Van Skirk, supra, applies regardless of whether the defendant is a Colonel, as in that case, or a Private First Class, as here:

The military service does not leave those permanently injured [or, it may be added, the survivors of those killed] in line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff-appellant is a remedy he likes better.

5 F. 2d at 298.

The foregoing establishes that the district court correctly dismissed the complaint as to the individual defendants who were the superior officers of PFC Mattos. We have also established that appellants have no claim against PFC Vaughn. The district court did not reach the question of whether the case should be dismissed as to PFC Vaughn, since it had substituted the United States for PFC Vaughn as a defendant under the Government Drivers Act. However, the district court's judgment (R. 46) has the effect of dismissing the action as to all defendants. Appellants now argue that, having dismissed the case as to the Government, the district court should have remanded the suit against PFC Vaughn to the State court, rather than entering a judgment dismissing the complaint. 9/ We now show: (1) that 28 U.S.C. 1442(a)

/ Appellants made no motion to remand in the district court.

supplies an independent basis for retention of jurisdiction over the claim against PFC Vaughn, irrespective of the provisions of the Government Drivers Act, and (2) alternatively, that the Government Drivers Act does not require a remand to the State court where the case against the Government is dismissed on the basis the Feres doctrine.

III.

UNDER 28 U.S.C. 1442(a), THE DISTRICT COURT HAD JURISDICTION TO DISMISS THE ACTION AS TO ALL INDIVIDUAL DEFENDANTS, INCLUDING THE GOVERNMENT DRIVER.

Appellants argue that the Government Drivers Act requires a remand to the State court where, after a suit has been removed to the federal court and the Government has been substituted as defendant for its employee driver, the case is dismissed on the merits as to the Government. Subsection (d) of the Government Drivers Act directs a remand to the State court "[s]hould a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit * * * is not available against the United States." 28 U.S.C. 2679(d). However, the Government Drivers Act does not require remand where an independent basis of federal jurisdiction exists. Thus, for example, remand would not be required if diversity jurisdiction existed with respect to the Government driver. Here removal of the case as to all the individual defendants, including PFC Vaughn, was accomplished under 28 U.S.C. 1442(a). That statute justified retention of federal jurisdiction over PFC Vaughn, even if the Government Drivers Act would otherwise have required a remand.

28 U.S.C. 1442(a) authorizes removal to a federal court of action in a State court against "any officer of the United States or any agency thereof, or person acting under him, for act under color of such office." Application of this statute is clearly proper as to the defendants who were PFC Vaughn's superior officers. And while the application of the removal statute to Vaughn might be doubtful were he the only defendant, this Court squarely held that where removal as to some defendants is proper under 28 U.S.C. 1442(a), the district court may retain jurisdiction as to all defendants, even though no other basis for federal jurisdiction exists. Murphy v. Kodz, 351 F. 2d 163 (1965). 11

Several district court decisions have held 28 U.S.C. 1442(a) applicable to Government drivers charged with negligence. as v. Mitchell, 233 F. Supp. 414 (D. Md. 1964); Ebersole v. Helm, 5 F. Supp. 277 (E.D. Pa. 1960); Fink v. Gerrish, 149 F. Supp. 6 (S.D.N.Y. 1957); Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J. 1959). Contra: Pepper v. Sherrill, 181 F. Supp. 40 (E.D. Tenn. 1958).

On the other hand, removal has been held proper in cases involving complaints charging medical malpractice by Government doctors. Allman v. Hanley, 302 F. 2d 559 (5th Cir. 1962); Blitz v. [unclear], 328 F. 2d 596 (2d Cir. 1964), certiorari denied, 379 U.S. [unclear].

Under Murphy v. Kodz, the district court would have discretion to remand the case as to PFC Vaughn to the State court. 351 F. 2d at 167-68. However, since appellants never moved for a remand in the district court, they cannot now ask this Court to hold that the district court should have exercised its discretion to remand. Moreover, the circumstances of the present case would clearly militated against any exercise of discretion to remand. For here the case may properly be disposed of as to all defendants in one proceeding. Moreover, the suit against PFC Vaughn involves a federal question, which the federal courts may appropriately decide. See Curnutt v. Holk, 230 Cal. App. 2d 50, 584, 41 Cal. Rptr. 174, 176 (2d Dist. 1964): "The rights and liabilities of members of the Armed Forces of the United States arising from acts occurring while acting under orders in the line of duty is one of federal military law." See Feres v. United States, 340 U.S. 135, 142-144.

THE GOVERNMENT DRIVERS ACT PROTECTS GOVERNMENT DRIVERS FROM LIABILITY FOR NEGLIGENT DRIVING WITHIN THE SCOPE OF THEIR EMPLOYMENT; THIS PROTECTION IS NOT LOST BY THE PLAINTIFF'S INABILITY TO OBTAIN A RECOVERY AGAINST THE UNITED STATES.

If the Court agrees with our position that the district court had jurisdiction under 28 U.S.C. 1442(a) to dismiss the case as to PFC Vaughn, and further agrees that dismissal was proper because of the military status of the parties, then it is not necessary to reach any further question. However, there is an alternative basis for affirming the dismissal as to PFC Vaughn. In our view, the Government Drivers Act does not require remand to the State court for reinstatement of the suit against the individual Government driver in cases where, although the driver was acting in the scope of his employment, the plaintiff for some reason fails to obtain recovery against the Government. Instead, remand to the State court is required only where it is shown that the Government driver was not acting within the scope of his employment.

The question here presented is presently before this Court in an appeal from a ruling of Judge Thompson in Van Houten v. R. et al., D. Nev. Civil No. 1911-N, decided September 1, 1967, appeal pending C.A. 9, No. 22,356. In that case, suit was brought against a Government driver by a co-employee. After substitution of the Government as a defendant, the case against the Government was dismissed on the ground that plaintiff's exclusive remedy against the United States was under the Federal

Employees Compensation Act. Since that Act does not protect the individual defendant from liability (see Allman v. Hanley, 302 F. 2d 559 (5th Cir. 1962)), Judge Thompson initially concluded that the suit against the individual driver should be reinstated. Upon reconsideration, however, Judge Thompson changed his view:

[T]he net result [of allowing the suit against the individual driver] is to attribute to Congress an intent when it adopted the Government Drivers Act amendment to the Federal Tort Claims Act which affronts common sense. Under that interpretation, a federal employee driver of a motor vehicle in the course of his employment is normally exonerated from personal liability, but not so if the injured person is another federal employee who has a claim for compensation under the Federal Employees Compensation Act. An intent to engraft such an incongruous exception to the general immunity from personal liability cannot be found in the language of the statute nor in the legislative history.

The Court's earlier viewpoint was founded on the statutory language, "the remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death * * * shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee of his estate."

The Court now has concluded that this plaintiff, although a federal employee having rights under the Federal Employees Compensation Act, is still a person to whom the statutory language, "the remedy against the United States provided by section 1346(b)" applies. Section 1346(b) encompasses "claims * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This is exactly such a case, and there is no provision of the Federal Tort Claims Act which would disqualify Van Houten

as a claimant or plaintiff thereunder. Congress, in the Government Drivers Act, 28 U.S.C. 2679(b), incorporated Section 1346(b) by reference as a description of the class of cases to which the exclusivity of the remedy against the Government and the immunization of the individual federal employee from liability apply. The fact that for some extraneous reason the particular plaintiff cannot successfully maintain suit under the Federal Tort Claims Act should not change the result.

Judge Thompson's reasoning is fully applicable here. It would indeed be "incongruous" if the Government Drivers Act were construed to protect PFC Vaughn from suit by a civilian injured by his driving of a military vehicle, but to allow the suit when the victim of the accident is another soldier. The suit against PFC Vaughn is covered by 28 U.S.C. 1346(b), since it is a claim arising out of a Government employee's alleged negligence in the scope of his employment. Thus, under the exclusivity provision of the Government Drivers Act, 28 U.S.C. 2679(b), plaintiffs must look to Section 1346(b) for their recovery. The fact that for some reason they cannot obtain recovery, does not remove the protection accorded by the Act to Government drivers acting within the scope of their employment.

The legislative history confirms Judge Thompson's reading of the statute. The Government Drivers Act was enacted to protect Government drivers from the threat and burden of suits and judgments resulting from driving on the job. H. R. Rep. No. 29 87th Cong. 1st Sess., at 3-4. The Act was intended to protect the employee "from any personal liability where it is conceded that he was acting within the scope of his employment." 107

ong. Rec. 18500 (Sen. Keating). 12/ Such protection would be illusory if it did not apply to suits by co-employees: indeed, allowance of such suits would require Government drivers to obtain liability insurance covering their Government driving -- an expense which it was the purpose of the Act to avoid.

Subsection (b) of the Drivers Act, 28 U.S.C. 2679(b) -- which makes the remedy against the Government "exclusive" of any suit against the employee -- is the "basic provision of the bill." S. Rep. No. 297, 87th Cong. 1st Sess., at 4. Subsection (d), 28 U.S.C. 2679(d), is a procedural provision applicable only where the original suit is brought in a state court, and should not be read to cut back the protection afforded by the exclusivity provision. 13/ The provision in subsection (d) requiring remand where "a remedy by suit within the meaning of subsection (b) of this section is not available against the United States," refers back to the exclusivity provision of subsection (b) -- which, as Judge Thompson pointed out, protects the employee whenever he

2/ The bill as it emerged from the Senate Judiciary Committee would have permitted a plaintiff the choice as to whether his action was to be removed to the federal court for trial under the Tort Claims Act. S. Rep. No. 736, 87th Cong. 1st Sess., at 5, 18. A similar provision had led to a Presidential veto of an earlier bill. House Misc. Documents, 86th Cong. 2d Sess., Document No. 415. The provision was deleted from the Judiciary Committee's bill on the Senate floor, and instead the present provision -- requiring removal upon certification by the Attorney General that the driver was acting in the scope of his employment -- was inserted. Senator Keating explained that the bill as adopted "makes certain that suits will not be removed improperly, but protects the employee from any personal liability where it is conceded that he was acting within the scope of his employment." 107 Cong. Rec. 18500.

3/ Subsection (d) would not apply where the original suit was brought in the federal court on the basis of diversity jurisdiction. The scope of protection afforded the Government driver was clearly not intended to depend on whether the suit against him was originally brought in the State or federal court. Thus the application of subsection (d) cannot affect the employee's protection from suit.

was acting in the scope of his employment. Thus when the district court conducts a remand hearing under subsection (d), the purpose is simply to determine whether the driver was acting in the scope of his Government employment. The purpose of the remand hearing is not to determine whether the plaintiff will ultimately succeed in recovering against the Government.

The authorities support this reading of the Drivers Act. Van Houten v. Ralls, et al., supra; Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967); see Noga v. United States, 272 F. Supp. 51 (N.D. Calif. 1967), appeal pending. Similarly, in Hoch v. Carter, 242 F. Supp. 863 (S.D.N.Y. 1965); Reynaud v. United States, 259 F. Supp. 945 (W.D. Mo. 1966); and Fancher v. Baker, 240 Ark. 288, 399 S.W. 2d 280 (1966), the courts held the Government driver immune from liability in situations where the Tort Claims Act remedy was unavailable because the limitation period had expired.

The only support for appellant's position is a statement in Tavolieri v. Allain, 222 F. Supp. 756 (D. Mass. 1963); this statement was pure dictum, since there the remand was on the ground that the driver was not acting within the scope of his Government employment. The other cases cited by appellant are completely inapposite. 14/

14/ In Adams v. Jackel, 220 F. Supp. 764 (E.D.N.Y. 1963), the court denied a motion to dismiss by the individual defendant on the ground that it might still be shown at a remand hearing that he was not acting in the scope of his Government employment. In Atnip v. United States, 245 F. Supp. 386 (E.D. Tenn. 1965), the court denied a motion to remand, on the ground that the individual defendant was within the scope of his Government employment. In Jarrell v. Gordy, 162 So. 2d 577 (La. App. 1964), the court refused to hold the Government driver immune from suit, on the ground that the United States had not removed the case to the federal court and effected a substitution of parties.

To summarize, the Government Drivers Act remits a person injured by a Government driver to his suit against the United States under the Federal Tort Claims Act. It does not guarantee that he will be able to obtain recovery in that suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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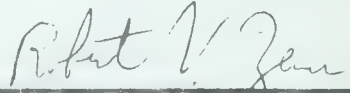
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MAY 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } SS.

ROBERT V. ZENER, being duly sworn, deposes and says:


That on May 9, 1968, he caused three copies of the foregoing Brief for the Appellees to be served by air mail, postage prepaid, upon counsel for appellants' as follows:

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Subscribed and Sworn to before
me this 9th day of May, 1968.



NOTARY PUBLIC

My Commission expires August 31, 1971.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HUGH BRYSON,

Appellee.

NO. 22474

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U.S. COURT OF APPEALS



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IN THE UNITED STATES COURT OF APPEALS
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HUGH BRYSON,

Appellee.

NO. 22474 ✓

REPLY BRIEF OF APPELLANT

THE ISSUE OF CUSTODY

Appellant does not concede jurisdiction. This is clear from the discussion in our opening brief (pp. 6-9).

Appellee suggests at page 9 of his brief that the issue of custody has been determined by findings made by the court below. It is true that in its opinion the District Court stated that:

"Petitioner is presently on parole and a substantial part of his fine (\$8,000 remains unpaid. Consequently, his parolee status continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote." (R. 78)

These are legal conclusions asserted by the lower court based upon no facts and quite inconsistent with both law and logic. The claim that appellee is still on parole because of non-payment of his fine begs the very question at issue: Had his term of sentence and legal custody ended? The record reveals nothing complying with the intendments of

Rule 52, F.R.C.P., and is simply an unsupposed conclusion by the court as matter of fact of that which was and remains a question of law.

Bryson had completed his sentence before the end of 1963. Whatever view the parole and probation officers may have entertained (and there is no evidence in the record as to their position or action in this respect) they could not confer jurisdiction upon themselves to maintain a parole status over appellee in view of the statutory scheme of Title 18 in the following Sections:

Section 3568* ("* * * no sentence shall prescribe any other method of computing the term.");

Section 3569* (procedures for discharge of fines imposed upon indigent prisoners);

Section 4161* (method of computation of sentence);

Section 4164* (released prisoner as parolee);

and finally, the clear intendment of

Section 4203 (relating to terms and conditions of parole and release) which provides in appropriate part as follows:

"Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced."

* The relevant portions of these sections appear in the Appendix, post, as does also Section 4163 (discharge).

The statement in United States v. Gottfried, 197 F.2d 239, cited on page 10 of appellee's brief, to the effect that jurisdiction of the parole board continues until a fine is paid or otherwise discharged, could not of course accomplish an enlargement of term beyond that prescribed by Congress.

It is significant that neither the opinion of the District Court nor the brief of appellee cites a single authority refuting appellant's position. That position is concisely stated in In re Greenwald, 77 Fed. 590 (Circuit Court, N.D. Calif.) in relation to the effect of Section 1042 of the Revised Statutes, the predecessor of Section 3569:

"There is nothing, however, in the foregoing provisions to indicate that any imprisonment to enforce the payment of a fine imposed may be extended beyond the maximum term of imprisonment fixed by Congress in punishment of the particular offense denounced, * * *" (At 594)

APPELLEE IS FORECLOSED FROM THIS CHALLENGE BY THE
DECISION IN DENNIS V. UNITED STATES

We submit that appellee Bryson is barred from challenging the constitutionality of Section 9(h) by the ruling of the Supreme Court in Dennis v. United States, 384 U.S. 855.

As the Dennis court said (at p. 865),

"Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case."

Bryson was indicted under Title 18 U.S.C. Section 1001, charged with making a false affidavit. Section 1001 is made applicable to affidavits filed under Section 9(h) of the Taft-Hartley Act (29 U.S.C. Section 159(h)) by the terms of that Section.

The same reasoning upon which the Dennis Court refused to reach the constitutionality of Section 9(h) applies as to Bryson's case before this Court. His attempt to distinguish Dennis does not withstand scrutiny. First, contrary to all rationalization is his premise that the offense of making a false affidavit is less "onerous" than the offense of conspiring to make such false affidavits. By statute, each of these offenses is subject to the same identical penalty, not more than 5 years imprisonment or \$10,000 fine, or both. Nor can Dennis be distinguished by the argument that Bryson has always denied his guilt. As we said in our Opening Brief (pp. 11-12) Bryson, like the Dennis defendants, filed a false affidavit in order to secure for his union as well as for himself, the advantages of access to the facilities of the Labor Board, and like them, he pleaded "not guilty". The argument of denial of guilt is immaterial and completely irrelevant to the basic question of whether justice dictates that Bryson be granted relief from his conviction. Bryson was tried and convicted by a jury who heard all the evidence. Equally irrelevant is Bryson's suggestion that there is a distinction in that the Dennis case was on a direct appeal from conviction, while Bryson is seeking to invoke a post-conviction remedy. Bryson cannot expect to benefit from the fact that his plea for relief is late in reaching the Court. Furthermore, Bryson is not

the "sole" victim of Section 9(h), as he suggests. In several cases the courts have sustained convictions under 18 U.S.C. 1001 for the filing of false non-communist affidavits by union officers or for conspiring to do so. For example, Lohman v. United States, 266 F.2d 3 (C.A. 6); Sells v. United States, 262 F.2d 815 (C.A. 10), cert. denied 360 U.S. 913; Hupman v. United States, 219 F.2d 243 (C.A. 6), cert. denied, 349 U.S. 953; West v. United States, 274 F.2d 885; and, of course, Dennis v. United States, 384 U.S. 855.

THE ARGUMENT OF UNCONSTITUTIONALITY OF

SECTION 9(h) IS WITHOUT MERIT

As we have shown in our Opening Brief (pp. 15-23) Bryson's arguments attacking the constitutionality of the statute have no merit. American Communications Association v. Douds, 339 U.S. 382, held that Section 9(h) was constitutional as a reasonable provision by Congress to prevent communist control of and infiltration into the labor movement as part of their conspiracy to overthrow the government of the United States. United States v. Brown, 381 U.S. 437, did not overrule Douds (see our Opening Brief, pp. 15-17). In Leedom v. International Union of Mine, Mill and Smelter Workers, 352 U.S. 145, and Amalgamated Meat Cutters v. National Labor Relations Board, 352 U.S. 153, the court added that the sole sanction for the filing of a false affidavit under Section 9(h) is the criminal penalty imposed on the union officer who files a false affidavit. Now Bryson suggests that this sole sanction is constitutionally invalid because it is too vague and because it abridges rights of free speech and association and to

engage in political activities. In other words, while Congress, according to Douds, may constitutionally require the filing of non-communist affidavits, it may not constitutionally make punishable the filing of such an affidavit which is false. The suggestion carries its own refutation.

Bryson now (pp. 23-25) attempts to give an "overbroad" construction to the recent decisions of the Supreme Court. Moreover, in United States v. Robel, the Court recognized that "While the Constitution protects against invasion of individual rights, it does not withdraw from the government the power to safeguard its vital interests. . . . And Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials." (389 U.S. 258, at 267). In effect, the Court has said that there are "sensitive" positions and areas from which Congress by properly drawn legislation may bar certain types of individuals. We submit that Section 9(h) would withstand constitutional attack notwithstanding the recent decisions of the Supreme Court cited by Bryson.

We have already pointed out in our Opening Brief that the answer to appellee's contentions is that it is not necessary or proper for this Court to consider the constitutionality of Section 9(h). Bryson was convicted by a jury of willful and knowing violation of Section 1001 of Title 18, and questions with respect to the validity of his conviction and the constitutionality of Section 9(h) are irrelevant. Dennis v. United States, 384 U.S. 855.

CONCLUSION

For the foregoing reasons, the order of the District Court should be set aside and the conviction and sentence of the trial court should be reinstated.

Respectfully submitted,

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APPENDIX

Statutes

§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. * * *

* * * * *

No sentence shall prescribe any other method of computing the term. As amended Sept. 2, 1960, Pub.L 86-691, § 1(a), 74 Stat. 738.

§ 3569. Discharge of indigent prisoner

(a) When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States commissioner in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter.

If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding \$20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I do not have any property, real or personal, exceeding \$20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use and benefit. So help

APPENDIX

me God." Upon taking such oath such convict shall be discharged; and the commissioner shall file with the institution in which the convict is confined, a certificate setting forth the facts. In case the convict is found by the commissioner to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; * * *

§ 4161. Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

* * * * *

* * * * *

Eight days for each month, if the sentence is not less than five years and less than ten years.

* * * * *

§ 4162. Industrial good time

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner

performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

§ 4163. Discharge

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. * * *

§ 4164. Released prisoner as parolee

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

CECIL F. POOLE

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United States Attorney

CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Reply Brief of Appellant was this date mailed to the following:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

HUGH BRYSON,

BRIEF FOR APPELLEE

Attorneys for Appellee

FILED

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8 IN THE UNITED STATES COURT OF APPEALS
9 FOR THE NINTH CIRCUIT
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1 UNITED STATES OF AMERICA,)
2 Appellant,) NO. 22474
3 -vs-)
4 HUGH BRYSON,)
5 Appellee.)
6
7

8 BRIEF FOR APPELLEE
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
	)	NO. 22474
Appellant,)	
	)	<u>BRIEF FOR APPELLEE</u>
-vs-)	
HUGH BRYSON,)	
)	
Appellee.)	

STATEMENT OF THE CASE

In 1955, appellee was convicted of having falsely denied, in an affidavit required to be filed by Section 9(h) of the Labor Management Relations Act of 1947 (29 USCA 159[h]), that he was then "affiliated" with the Communist Party. 1/ He was

1/ The original indictment was in three counts: (a) that appellee had falsely denied that he entertained a personal belief in the forcible overthrow of the government--this was abandoned by the prosecution before trial; (b) that he falsely denied that he was a member of the Communist Party--on this he was acquitted by the jury; (c) the "affiliation" count--on this, although the jury found him guilty, it apparently had serious doubts as to the meaning of the count (see Order Setting Aside Conviction and Sentence, typewritten Opinion, p. 9, 1.25, et seq)

because of the failure of several of the justices to participate, did not muster a majority of the court.^{2/}

(2) In 1959, section 9(h) was repealed; contemporaneously, section 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 USCA 504) "was enacted to replace" it. United States v. Brown, 381 U.S. 437, 439 (1965).

(3) In 1965, section 504 was held unconstitutional as a bill of attainder in an opinion, United States v. Brown, supra, which said (381 U.S. at 460) that the court in Douds has "misread" an earlier bill of attainder case (United States v. Lovett, 328 U.S. 303 [1945]), and strongly suggested (381 U.S. at 447) that Douds had departed from the "spirit" in which the bill of attainder clause had been "consistently interpreted". The four dissenting justices in Brown were in no doubt that the majority opinion there "obviously overruled" Douds, 381 U.S. at 464.

It has been mentioned that Bryson, in the years following his release on parole in 1959, paid \$2,000 of the \$10,000 fine. Late in 1966, the Government caused to be issued, in the original criminal case proceedings, a subpoena duces tecum requiring Bryson to attend at a designated time and place for the taking of his deposition. He was subjected

^{2/} The issue of whether the word "affiliation" was void for vagueness was especially troublesome. See 339 U.S. 412-413, 420*, n.2.

*("...The dubious scope of the term 'affiliated'")
436, 439, 451.

to a thorough and detailed examination of his assets and liabilities, income and expenses, income tax return for 1965, and the potential value of inchoate interests acquired in real property transactions in which he had acted as a licensed real estate salesman (See deposition of Hugh Bryson, December 16, 1966, filed in United States v. Bryson, Criminal No. 34105). The Government sought various assignments of these assets, "to be applied in satisfaction of the fine in United States v. Bryson, Criminal No. 34105" (letter, December 19, 1966, from Peter V. Shackter, Assistant United States Attorney, to Richard Gladstein, attorney for appellee), and subsequently "commenced steps toward levying" on one parcel of land (letter, January 27, 1967, from Shackter to Gladstein). In May, 1967, the Government filed a civil complaint, seeking judgment for \$8,000 and costs (United States v. Bryson, Civil No. 47080). Following Bryson's institution of the proceedings below, efforts to enforce collection were discontinued, upon a written stipulation conditioned to the outcome of Bryson's petition (Stipulation and Order, No. 46116).

The proceedings below were begun in 1967, when Bryson filed, in the district court, a "Motion for Writ of Error Coram Nobis to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for Other Requested Relief." He alleged that the district court had jurisdiction under the "All Writs Section" of the Judicial Code (28 USCA 1651[a]) (R. 4), as well as under 28 USCA

2255. 3/

After a hearing on the merits, the district court ordered that his conviction and sentence be set aside, that he be released from parole, and that he be relieved of the remaining portion (\$8,000) of his fine.

JURISDICTION

The jurisdiction of the district court squarely rested on either or both 28 USCA 1651(a) and 28 USCA 2255. The jurisdiction of this court over the appeal rests upon 28 USCA 1291.

STATUTES INVOLVED

All of the statutes involved in this proceeding are quoted in the Government's brief, save and except the All Writs section, which reads as follows:

"§1651. Writs.

(a). . .all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 USCA 1651[a])

3/ The Government writes its brief as though the All Writs statute is no part of this case. As will later be seen, the district court relied on the All Writs statute as an alternative ground of jurisdiction (R. 80).

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SUMMARY OF ARGUMENT

1. As a result of his conviction and sentence, and his inability to pay the remaining portion of the fine imposed, Bryson is still required to report monthly to a probation officer, is subject to the supervisory powers of a parole officer, may not travel outside the State without permission, and may not vote or obtain a passport. These restraints are sufficient to constitute custody within the meaning of 28 USCA 2255 and to give the district court jurisdiction of this action under that section. Jones v. Cunningham, 371 U.S. 236 (1963); Carafas v. LaValle, 391 U.S. 234 (1968); Hoptowit v. United States, 274 Fed. 2d 936 (9 Cir., 1960); United States v. Dimario, 246 F. Supp. 786 (ED, Mich., 1965).

Alternatively, the district court had jurisdiction, without regard to the question of custody, under 28 USCA 1651(a)--the "all writs section". United States v. Morgan, 346 U.S. 502 (1954); Migdal v. United States, 298 F. 2d 513 (9 Cir., 1961).

2. Bryson had standing to challenge section 9(h) as an unconstitutional bill of attainder. Dennis v. United States, 384 U.S. 855 (1966), upon which the Government relies, is distinguishable because the defendants in that case had forfeited their right to assert the challenge, due to their participation in a conspiracy to engage in a fraudulent

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1 course of conduct to conceal their undenied membership in
2 the Communist Party. Here, the conviction of the substantive
3 offense of stating that he was not "affiliated" with the
4 Party when the jury found (with some misgivings as to the
5 meaning of the word) that he was, is of an entirely different
6 character and does not result in a forfeiture of his standing
7 to make the challenge.

8 Alternatively, the Dennis case is distinguishable for
9 there the attack came on direct appeal from the conviction.
10 Here, Bryson is invoking post-conviction remedies which are
11 always available for precisely such a challenge as he now
12 makes. Sunal v. Large, 332 U.S. 174 (1947); Fay v. Noia,
13 372 U.S. 391 (1963); Sanders v. United States, 373 U.S. 1
14 (1963).

15
16 3. Section 9(h) was unconstitutional as a bill of attainder,
17 since it was a retroactive act which imposed punishment
18 upon an easily ascertainable class without a judicial trial.
19 Ex parte Garland, 4 Wall. 356 (1867); Cummings v. Missouri,
20 4 Wall 333 (1867); United States v. Lovett, 328 U.S. 303
21 (1945).

22 It was also unconstitutional as a deprivation of rights
23 guaranteed to Bryson by the First Amendment to the Con-
24 stitution. Keyishian v. Board of Regents, 385 U.S. 589
25 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Dombrowski
26 v. Pfister, 380 U.S. 479 (1965); Aptheker v Secretary of

1 State, 378 U.S. 500 (1964), and Scales v. United States, 367
2 U.S. 203 (1961).

3
4 4. It is appropriate to apply to Bryson's case the principles
5 of United States v. Brown, supra, and the other bill of at-
6 tainder cases, as well as the principles of Keyishian, supra,
7 and the other First Amendment cases, because the problems
8 which are believed to arise from a retroactive application of
9 Keyishian do not exist here. There is no danger of mass re-
10 litigation, nor would there be any occasion for retrial here.
11 The holding in appellee's favor terminates this litigation
12 once and for all.

13
14 ARGUMENT

15 1. THE DISTRICT COURT HAD JURISDICTION TO HEAR AND DETERMINE
16 THE PETITION TO SET ASIDE APPELLEE'S CONVICTION AND
17 SENTENCE

18 The Government argues (Br. 6) that, because Bryson was
19 not "in custody", the district court was without jurisdiction
20 to proceed under 28 USCA 2255. The argument fails to ap-
21 preciate the full significance of the cases which have
22 broadened the "in custody" concept, and ignores the alternative
23 basis upon which the district court asserted jurisdiction:
24 e.g., 28 USCA 1651(a).

1 (a) Bryson was under sufficiently significant restraint
2 to constitute custody and thus to give the district
3 court jurisdiction under 28 USCA 2255

4 The Government recognizes that "from an early view
5 that only institutional confinement would suffice. . .the
6 meaning [of 'in custody'] has broadened to encompass restraint
7 under parole or probation" (Br. 6). It argues, however, that
8 Bryson's status in May of 1967, when the petition was filed,
9 did not qualify even under the broader meaning of custody.

0 (i) The record.

1 The petition (R. 3-4) alleges that, by virtue
2 of Bryson's inability to pay the entire fine, "the said period
3 of parole [has] continued in effect"; and that as a result he
4 remains "under the supervision" of a probation officer, that
5 he is "required" to make monthly reports to said officer, that
6 he cannot travel outside of California without first securing
7 permission from the probation officer, and that he is "subject
8 at all times to the supervisory parole powers" of the pro-
9 bation officer.⁴ /

0 These allegations were not denied by the
1 Government, and the district court found them to be true:

2 "Petitioner is presently on parole and
3 a substantial part of his fine (\$8,000) remains
4 unpaid. Consequently, his parolee status

5 ⁴ / It also alleges that, as an additional concomitant of the
6 conviction, Bryson has been deprived of his right to vote
and to obtain a passport (R. 4).

continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote." (R. 78)

This finding of the district court is not, nor could it be, assailed as "clearly erroneous", F.R.C.P., Rule 52. It is therefore to be accepted by this court.

The Government argues, however, that despite these restraints, Bryson may not utilize the procedures of section 2255. The argument is that, while the Board of Parole "continued to assert jurisdiction over Bryson after 1963", it could not "imprison him from, for example, the date he filed his present petition until this matter is decided" (Br. 8). This confusing statement appears to be inconsistent with the authorities cited in appellant's footnote 7, particularly United States v. Gottfried, 197 F. 2d 239 (2 Cir., 1952), which holds that the jurisdiction of the parole board continues "until the fine is paid or otherwise discharged" (at 241). Compare 18 USCA 3535: the issuance of execution shall not discharge the defendant from imprisonment "until the amount of the judgment is paid"; and see Panno v. United States, 203 F. 2d 504, 509-510 (9 Cir., 1953), and Callahan v. United States, 371 F. 2d 658, 661 (9 Cir., 1967). In any case, the Government recognizes (note 7) the additional possibility that Bryson might be proceeded against by way of contempt.

It is submitted that the restraints on Bryson's liberty found to exist by the district court, as well

as those further possibilities suggested by the Government itself, place Bryson "in custody" for the purpose of permitting him to invoke, and the district court to exercise, jurisdiction under section 2255.

(ii) The law.

In Jones v. Cunningham, 371 U.S.

236 (1963), the Supreme Court held that a state prisoner on parole was sufficiently restrained of his liberty to be able to invoke the jurisdiction of the federal courts under 28 USCA 2241.^{5/}

" in fact, as well as in theory, the custody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole officer to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice." (Jones v. Cunningham, supra, at 242).

The restraints upon Bryson's liberty to do and go as he pleases are in no substantial way different from those imposed in Jones. Bryson's duty to report monthly

^{5/} Both 28 USCA 2241 (dealing with habeas corpus for state prisoners) and 28 USCA 2255 use the identical words "in custody". The two sections have been similarly construed, and "in custody" means the same in each of them. United States v. Hayman, 342 U.S. 205 (1952); Matysek v. United States, 339 F. 2d 389, 394 (9 Cir., 1964).

and to secure permission to travel outside the state are restraints sufficient to constitute "custody". Compare Hoptowit v. United States, 274 F. 2d 936, 938 (9 Cir., 1960) and United States v. DeMario, 246 F. Supp. 786, 787 (ED, Mich., 1965) (both cases arising under section 2255). For a recent further expansion of the "in custody" concept in still another context, see Peyton v. Rowe, 391 U.S. 54, 64, 67 (1968), and United States v. Myers, 394 F. 2d 619 (3 Cir., 1968); and compare the restrictions on Bryson's liberty with those found in Carafas v. LaValle, 391 U.S. 234 (1968) to be sufficient to sustain jurisdiction under the habeas corpus statute.

"It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' Fiswick v. United States, 329 US 211, 222, 91 L.Ed 196, 203, 67 S Ct 224 (1946). On account of these 'collateral consequences', the case is not moot. Ginsberg v. New York, US ___, n.2, 20 L.Ed. 2d 195, 200, 88 S Ct. __ (1968); Fiswick v. United States, supra, at 222, n. 10, 91 L.Ed. at 203; United States v. Morgan, 346 US 502, 512-513, 98 L. Ed. 248, 257-258, 74 S.Ct. 247 (1954)." (Carafas v. LaValle, 391 US at 237-238)

- (b) Apart from the question of custody, the district court had jurisdiction under 28 USCA 1651(a).

The Government ignores altogether this alternative

basis of jurisdiction, although Bryson's petition was expressly captioned as a motion for a "Writ of Error Coram Nobis" (R. 1) and 28 USCA 1651(a) was specifically pleaded as a basis for the district court's jurisdiction (R. 4). In fact, the district judge particularly found and concluded^{6 /} that jurisdiction rested alternatively on 28 USCA 1651(a) (R. 80).

The district court's discussion of this issue appears in its Order, at pages 80-81, of the record. The Government apparently has let the point go by default, for its brief nowhere considers it. We assume it is unnecessary for us to add more than a brief observation to the district court's discussion of the matter.

Plainly, "custody" is not a prerequisite to relief under section 1651(a), United States v. Morgan, 346 U.S. 502 (1954); Migdal v. United States, 298 F. 2d 513, 515 (9 Cir., 1961), and that under that section the district court possessed jurisdiction to hear and determine Bryson's claim upon the allegations of the petition (R. 8-9) that the law was changed after Bryson's time for a direct appeal had expired. See Sunal v. Large, 332 U.S. 174, 181 (1947).

And the fact that the prison sentence has been completely served, is likewise no basis for denying relief,

^{6 /} The court directed that its 16-page typewritten "Order Setting Aside Conviction and Sentence" (R. 77-92) "constitutes the court's findings of fact and conclusions of law" (R. 92), F.R.C.P., Rule 52.

1 as this court has recently held.

2 "The district court denied appellant's
3 petition without a hearing indicating that it
4 had no jurisdiction by reason of the fact that
the sentences in the District Court of Arizona
had been completed.

5 We disagree. One of the purposes of
6 coram nobis is to allow a defendant to attack
7 a conviction notwithstanding the fact that he
8 has completed sentence. *United States v.*
9 *Morgan*, supra at 512, 74 S.Ct. 247. A defen-
0 dant may be harmed by an invalid conviction
1 even after he has served his sentence; i.e.,
2 subsequent conviction may carry heavier pen-
3 alties, and his civil rights may be affected.
4 Coram nobis must be kept available as a post-
conviction remedy to prevent 'manifest in-
justice' even where the removal of a prior
conviction will have little present effect on
the petitioner. See *Mathis v. United States*,
369 F. 2d 43 (4th Cir., 1966); see generally,
Note, 55 Geo.L.J. 851, 865-70 (1967)."
(*Holloway v. United States*, 393 F. 2d 731,
733 [9 Cir., 1968]).

- 5 2. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT DENNIS v.
6 UNITED STATES, 384 U.S. 855 (1966) IS NOT CONTROLLING WITH
7 RESPECT TO BRYSON'S "STANDING" TO ATTACK SECTION 9(h)

8 The Government argues that, even if the district court had
9 jurisdiction and even if United States v. Brown, 381 U.S. 437
0 (1965) "calls in question the continued validity of the Douds
1 case as constitutional law" (Br. 9), Bryson -- the chief and
2 indeed almost the sole victim of that judicial mistake -- is in
3 no position to challenge the disabilities under which he now
4 suffers as a result thereof. It says that because, in Dennis
5 v. United States, 384 U.S. 855 (1966), the court refused to
6 accord "standing" to an attack on section 9(h) [by a group of
defendants differently situated], such standing may not be

1 accorded here to Bryson.

2 Bryson asserted below, first, that his case was distin-
3 guishable from that of the Dennis defendants; and, second, that
4 since he was attacking the 9(h) conviction collaterally, not
5 directly as the Dennis defendants did, different considerations
6 apply to the question of standing. Because the district court
7 had no difficulty in distinguishing Dennis (and rightly so),
8 it had no occasion to consider the second ground urged by
9 Bryson. We think it is undeniable that the judgment below may
0 properly be based either on the ground adopted by the district
1 court, or on the alternative ground mentioned.

2 (a) Dennis v. United States, 384 U.S. 855, supra, is
3 distinguishable from the case at bar

4 Dennis, as both the Government and the district
5 court recognized (each citing the majority opinion), involved
6 the crime of "conspiracy" to violate 18 USCA 1001 (BR. 9; R.
7 84-85). That fact in itself constitutes a decisive ground of
8 distinction between Dennis and this case.

9 "It is the entire conspiracy and not
0 merely the filing of false affidavits, which
1 is the gravamen of the charge." (384 U.S.
2 855, 860)

3 Here there is no "conspiracy", "entire" or other-
4 wise; here there is "merely [a charge of] the filing of [a]
5 false affidavit. ."; here there was not, as there was in
6 Dennis, a "conspiracy, cynical and fraudulent" (384 U.S. 855,
865). Here, the district court found that Bryson, unlike

1 the Dennis defendants, "at all times denied the falsity of his
2 affidavit" (R. 9) and that Bryson, unlike the Dennis defendants,
3 was acquitted by the jury of the charge of falsifying as to
4 "membership" (R. 9). These findings, supported by the record,
5 are not claimed to be "clearly erroneous" (F.R.C.P., Rule 52)
6 and therefore are to be taken as true on this appeal.

7 In Dennis, the gravamen of the charge was that
8 dedicated Communists, acting at the behest of the party,
9 conspired falsely to pretend to leave it, while in fact re-
0 maining within it (384 U.S. at 859); it was this conduct on
1 their part that resulted in a forfeiture of their standing to
2 challenge 9(h). Here, the whole of the case is that a trade
3 unionist who was not a Communist Party member ^{7/} was punished for
4 the mistake of not knowing the meaning which the courts would
5 ultimately attach to the word "affiliation".

6
7 7/ This court had occasion to pass upon Bryson's character at
8 the time of an application for bail on appeal. It found
9 from the record that

"It appears that Bryson has no prior record of
convictions of any offenses, felony or misdemeanor. For
many years of his life he was an American merchant seaman,
subject to the jurisdiction of the United States Coast
Guard; at no time was he ever charged or convicted of any
violation of the rules or regulations of the United States
Coast Guard. In all respects whatsoever, save and except
for the conviction hereinabove mentioned, Bryson's record
of conduct has been and is without blemish.

* * * *

Coupled with this there are of record in the files
of this action statements of a large number of responsible
citizens of California to the effect that Bryson was a
reliable and dependable person, such elements in his
character being required to be considered by the last phrase
of 46(c), 'the character of the defendant.'" (Bryson v.
United States, 223 F. 2d 775 at 777 [1955]).

1 The distinction between cynical, lying conspirators
2 who engaged in a "voluntary, deliberate and calculated course
3 of fraud and deceit" (Dennis v. United States, supra, at 867)
4 and Bryson who, at most, mistook, while relying on legal advice
5 (R. 77,85), the significance of the amorphous term "affiliation",
6 is of paramount importance. As the district court observed,
7 "standing is not a rigid concept. . .And it is well it is not."
8 (R. 86). The differences between Bryson and those who engaged
9 in the deliberate, conspiratorial course revealed by the
0 Dennis record are of such dimension as to render the Government's
1 reliance on Dennis untenable. The district court was amply
2 justified in reaching the conclusion that "the rule of Dennis
3 does not strip Bryson of standing to attack the constitutional-
4 ity of Section 9(h)" (R. 87).

5 (b) Bryson has "standing" in this collateral proceeding
6 to invoke the unconstitutionality of section 9(h)

7 Dennis v. United States, 384 U.S. 855 (1966), was
8 not a case arising under section 1651(a) or section 2255,
9 therefore its strictures against lying conspirators have no
0 relevance at all to post-conviction proceedings. Bryson's
1 posture here is in no sense the same as that of the defendants
2 in Dennis. Unlike them, he does not seek relief upon the
3 ground that an unconstitutional statute forbids prosecution.
4 Prosecution has already occurred; the sentence has been imposed;
5 most of it has been served; and what remains of it, together
6 with the stamp of legality of the conviction, is what he seeks

1 to remove. Appellee is not restricted by considerations whose
2 relevance ended with the termination of the main trial. His
3 right presently to invoke the unconstitutionality of 9(h) is
4 not impaired by what the jury did at the trial.

5 If the fact of conviction, without more, were to be
6 deemed tantamount to a finding of such "dishonesty" or "fraud"
7 as to disqualify Bryson from obtaining relief now, sections 2255
8 or 1651(a) would never be available to any defendant who had
9 been found guilty despite his denial of guilt. No case holds
0 (nor does the Government cite any, for it does not even deal
1 with this point) that a defendant's unbelieved assertion that
2 he was innocent of wrongdoing, operates to deprive him of the
3 right thereafter to attack the conviction, the sentence, or the
4 statute under which he was tried. It has never been held that
5 while post-conviction relief is available where the offense
6 charged was murder or bank robbery or violation of the nar-
7 cotics law, an opposite rule governs convictions involving
8 fraud, dishonesty, or the like. The very text of the post-
9 conviction relief statutes rebuts any such supposition, and the
0 cases amply prove the point.

1 The fact that the offense involved was mail fraud,
2 did not prevent a disposition on the merits under 2255 in Kloian
3 v. United States, 349 F. 2d 291 (5 Cir., 1965), cert. den. 384
4 U.S. 913. The same principle obtained where the charge was
5 extortion (Stirone v. United States, 341 F. 2d 253 [3 Cir.,
6 1964], cert. den. 381 U.S. 902). Even the fact that the

1 defendant had been convicted of a conspiracy, has been held to
2 present no barrier to his right to receive post-conviction
3 relief (United States v. Sobell, 314 F. 2d 314 [2 Cir., 1963]).
4 In this Circuit, the rule is the same. Kuhl v. United States,
5 370 F. 2d 20 (9 Cir., 1966).

6 Clearly, it is the function of post-conviction pro-
7 cedures to bring such matters to the attention of a court and
8 to seek redress from a miscarriage of justice. (Sunal v. Large,
9 332 U.S. 174 [1927]; Fay v. Noia, 372 U.S. 391 [1962]; Sanders
0 v. United States, 373 U.S. 1 [1963]).

1 2 3. SECTION 9(h) WAS UNCONSTITUTIONAL

3 Inasmuch as the district court had jurisdiction to hear,
4 and Bryson had standing to urge, the claim that 9(h) was uncon-
5 stitutional, we turn now to a consideration of the merits of
6 that claim.

7 The district court held that 9(h) was unconstitutional
8 because it violated both the bill of attainder clause of the
9 federal constitution and its first amendment.

0 As to the bill of attainder point, the district court said:

1 "The Constitution seeks to avoid the evil that
2 inheres when a legislature can punish without a judicial
3 trial offering procedural safeguards and requiring a
4 finding that the specific individual being punished
5 does indeed constitute the danger sought to be pre-
6 vented. In short, then, bills of attainder are per-
7 nicious because legislative classifications may in-
8 clude persons whose conduct is not a danger which
9 may constitutionally be punished. The assumption of
0 §9(h) was that all communists were dangerous as unin

officials. Section 9(h) applied to the most docile communist even though he held no illegal aims. No judicial trial permitted a member or affiliate to show that he was not a threat to the national economy. He was automatically swept within the legislative class and punished by administrative sanctions. That is the evil of a bill of attainder." (R. 88)

As to the first amendment point, the district court said:

8 /

"Membership alone in a political party is constitutionally not a fact which can be legitimately proscribed. More than membership is required. 'Specific intent' is required -- a specific intent or belief in the illegal purposes of the group. Knowledge of the group's aims is not alone sufficient. Membership or less was deemed enough for a conviction in petitioner's case. 243 F. 2d at 839; 238 F. 2d at 663. The concept now frequently used to describe oaths and statutes which apply regardless of specific intent of the person touched by the law is 'overbreadth'. That is to say that statutes affecting mere members of political organizations are overbroad in that they punish people who are not a constitutionally punishable danger. Unless a member has an unlawful intent himself, he is not a person who constitutes a clear and present danger to the national security or economy. That is why a statute is said to be overbroad. Guilt by association may not be tolerated in a free society: '[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization. . .or which is not active membership violates constitutional limitations.' Keyishian v. Board of Regents, 385 U.S. 589, 608 (1967)." (R 89 ; emphasis added)

9 /

On both scores, the district court was correct.

8 / We remind once more that Bryson was acquitted of the charge of falsely denying membership. The conviction rested solely on a charge that he had falsely denied having sustained the relationship of "affiliation".

9 / Compare Brown v. U.S. (9 Cir., 1964), where this court held \$504 to violate the First and Fifth Amendments (334 F.2d 488).

1 (a) Section 9(h) was a bill of attainder

2 If one applies to 9(h) the tests laid down not only
3 in United States v. Brown, 381 U.S. 437 (1965), which was de-
4 cided after 9(h) was enacted, but also in cases like Cummings
5 v. Missouri, 4 Wall. 333 (1867); Ex parte Garland, 4 Wall. 356
6 (1867); and United States v. Lovett, 328 U.S. 303 (1945), which
7 preceded the enactment of 9(h), it is clear that 9(h) was an
8 unconstitutional bill of attainder. Those tests establish
9 that a law is unconstitutional as a bill of attainder if it is
10 a legislative act which imposes punishment upon an easily as-
11 certainable class without a judicial trial. That 9(h) did just
12 that, is too obvious for extended comment, notwithstanding
13 the main opinion in American Communications Association v.
14 Doud, supra.

15 The Government's contention that 9(h) is distinguishable
16 from section 504 (held unconstitutional as a bill of
17 attainder in Brown) because the former was merely a "re-
18 striction" while the latter was a "prohibition" (Br. 15-16), is
19 utterly fallacious. For bill of attainder purposes, "punish-
20 ment" has never meant, as urged by the Government here, only
21 "immediate criminal sanction" (Br. 17). See Garland, Cummings,
22 Lovett and Brown, supra. Moreover, section 9(h) invoked the
23 criminal sanctions of 18 USCA 1001 -- criminal sanctions that
24 were, in fact, applied against Bryson. The fact that the Taft-
25 Hartley law utilizes the penal provisions of the criminal code,
26 rather than having penal provisions separately written into it,
is no meaningful basis for any distinction between section 9(h)

and section 504. Thus, in practical effect, there is no distinction between the status in which Bryson and the defendant in Brown found themselves.

The difference in the results of these cases is that in 1950 the court in Douds, by "misreading" Lovett (United States v. Brown, 381 U.S. 437, 460) and by disregarding the "spirit" of such decisions as Cummings and Garland (United States v. Brown, supra, at 447), came to erroneous conclusions concerning the validity of the statute, whereas in Brown, the court in 1965 reverted to the true and original meaning of the bill of attainder clause.

(b) Section 9(h) violated the First Amendment

The district court held that 9(h) was "overbroad" in that it swept into its ambit all "affiliates" of the Communist Party irrespective of whether any of them (by virtue of their "affiliation", as distinguished from "membership") had the personal specific intent to engage in, or had the personal knowledge that the Communist Party engaged in, any activity which Congress could constitutionally prohibit. Its decision was soundly based on the most recent cases dealing with this issue. (Keyishian v. Board of Regents, 385 U.S. 589 [1967]; Elfbrandt v. Russell, 384 U.S. 11 [1966]; Dombrowski v. Pfister, 380 U.S. 479 [1965]; Aptheker v. Secretary of State, 378 U.S. 500 [1964]; and Scales v. United States, 367 U.S. 203 [1961]). Since the date of the order below, the Supreme Court has decided that a statute precluding employment in a defense facility on the ground

1 of membership in the Communist Party, was an unconstitutional
2 abridgment of the right of association guaranteed by the First
3 Amendment. United States v. Robel, 389 U.S. 258 (1967).

4 All the foregoing cases were decided after Douds,
5 and to the extent that Douds does not reflect their doctrine,
6 it is also "obviously overruled" by necessary implication
7 (United States v. Brown, 381 U.S. 437, 464 [1965]).

8 The Government's attempted distinction of Aptheker
9 v. Secretary of State, supra, on the asserted ground that in
0 some fashion the freedom to serve as a union officer is less
1 of a "constitutionally protected liberty" than the right to
2 travel (Br. 21) cannot withstand analysis. In the first place,
3 the rights or freedoms of American citizens cannot arbitrarily
4 be choked off in such a way. Who in the executive branch of
5 Government is qualified to say that one right is more con-
6 stitutionally protected than another? We have seen that United
7 States v. Robel, 389 U.S. 258, holds employment at a defense
8 facility is a right protected by the First Amendment (at 268);
9 can a rational distinction be made between such employment
0 and the job of a trade union officer? And if so, would not
1 the latter seem to be entitled to greater freedom from
2 governmental restraints?

3 Moreover, the Government's reservations in reference
4 to the protections that attach to the holding of trade union
5 office, seem unrealistic in the extreme. Of trade union
6 membership, the Supreme Court has said that it

1 "cannot be seriously doubted that the First
2 Amendment's guarantees of free speech, petition
3 and assembly give railroad workers the right
4 to gather together for the lawful purpose of
5 helping and advising one another in asserting
6 the rights Congress gave them in the Safety
7 Appliance Act and in the Federal Employers
8 Liability Act, statutory rights which would be
9 vain and futile if the workers could not talk
0 together freely as to the best course to follow.
1 . . . The Brotherhood's activities fall just as
2 clearly within the protection of the First
3 Amendment. And the Constitution protects the
4 associational rights of members of the union
5 precisely as it does those of the NAACP."
6 (Brotherhood of Railroad Trainmen v. Virginia
7 ex rel. Virginia State Bar, 377 U.S. 1, 5, 8
8 [1964]).

1 Manifestly, the First Amendment rights of union members to
2 select their own officers, with assurance that the choice will
3 be respected, would come to naught if intrusions were permitted
4 under the guise of action against their officers only. "The
5 right of members to consult with each other in a fraternal or-
6 ganization necessarily includes the right to select a spokes-
7 man from their number who could be expected to give the wisest
8 counsel." (Brotherhood of Railroad Trainmen v. Virginia ex. rel.
9 Virginia State Bar, supra, 377 U.S. 1, 6 [1964]).

0 In the second place, it is not merely a question
1 that turns on the particular right or freedom being asserted,
2 but rather whether there is constitutional power, by legis-
3 lative judgment, to "restrict" or to "prohibit" it. It is the
4 unconstitutional exercise of governmental power that is being
5 attacked; this does not depend upon how high in the hierarchy
6 of rights the Government chooses to regard the particular

activity, i.e., trade union leadership vs. foreign travel. Once the Government attempts to inhibit a citizen from peacefully exercising a First Amendment right -- to travel or to associate with others in a trade union (and to be elected to leadership in such a union, as were both Brown and Bryson) -- then the doctrine of overbreadth relied upon by the district court comes into play. That clearly is the teaching of Keyishian, Elfbrandt, Dombrowski, Aptheker, Scales and Robel, supra.

Nothing in the Government's attempted distinction of these cases undermines the validity of the district court's opinion. Indeed, we note the Government's admission that 9(h) suffered at least from "one of the vices of the statute held unconstitutional on its face in Aptheker: it "'rendered irrelevant the member's degree of activity in the organization and his commitment to its purpose.'" (387 U.S. at 510. . .)" (Br. 21). We also note the Government's concession that "in some of the cases cited" by the district court (specifically Keyishian and Dombrowski, supra) "the wide sweep of the language" justified a conclusion that First Amendment rights were being violated (Br. 23, n. 17).

It is clear that 9(h) was unconstitutional not only as a bill of attainder, but also as a direct infringement on First Amendment rights.

1 4. BRYSON MAY PRESENTLY AVAIL HIMSELF OF THE UNCONSTITUTIONALITY
2 OF SECTION 9(h)

3 The Government argues (Br. 12-13) that to apply the ruling
4 in Brown "retroactively" to Bryson's situation might "lead to
5 developments in the law of the finality of judgment, which we
6 cannot even imagine". It suggests that, to accord Bryson the
7 benefit of the most recent pronouncement of the Supreme Court
8 on bills of attainder will, in some undefined way, unsettle or
9 upset legal stability.

10 One reply that might be made, is to remind the Government
11 that the ends of justice are not always served by mechanical
12 adherence to "stability". The doctrine of "stare decisis is
13 not, like the rule of res adjudicata, a universal inexorable
14 command" (Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405
15 [1932], dissenting opinion of Mr. Justice Brandeis). In the
16 light of experience and fresh opportunity for reflection, the
17 Supreme Court has not infrequently overruled its constitutional
18 decisions. (For a list of such cases, see dissenting opinion
19 of Mr. Justice Brandeis in Burnet v. Coronado, etc., supra,
20 at pp. 407, n.2, and 409, n.4). More than a century ago, Chief
21 Justice Taney stated his position that

22 "it be regarded hereafter as the law of this court,
23 that its opinion upon the construction of the Con-
24 stitution is always open to discussion when it is sup-
25 posed to have been founded in error, and that its
26 judicial authority should hereafter depend altogether
on the force of the reasoning by which it is sup-
ported." (Smith v. Turner, 7 How. [48 U.S.] 283, 470
[1849]).

1 Clearly, then, the argument based upon "stability" loses
2 its force when submission to it results in the perpetuation of
3 past error. It does not follow, of course, that all corrective
4 decisions must automatically be given a retroactive application.
5 We do not ask the court to close its eyes to the practical ef-
6 fects that retroactivity may entail, and doubtless the courts
7 must weigh conflicting considerations in particular types of
8 cases, granting retroactive application in one and denying it
9 in another. (Compare Linkletter v. Walker, 381 U.S. 618 [1965]
10 and Johnson v. New Jersey, 384 U.S. 719 [1966] with Roberts v.
11 Russell, 391 U.S.____, 36 U.S.L.Wk 3472 [June 10, 1968].)
12 Admittedly, the nature of the constitutional right involved is
13 a factor of prime significance.

14 In our case, the constitutional right urged is of very
15 staunch caliber; it does not, because it cannot, depend upon
16 such fortuitous circumstances as whether counsel does or does
17 not make the appropriate objections at trial (we did, however, at
18 every stage of Bryson's criminal case, challenge 9(h) as an un-
19 constitutional bill of attainder, as well as being violative of
20 First and Fifth Amendment rights); nor does it change in con-
21 tent so as to reflect judicial efforts to improve or elevate
22 the enforcement of laws in our country. It is a right which is
23 not even susceptible to the practical transformations that come
24 into existence out of the everlasting clash between the need to
25 safeguard the security of Government, and the need to protect
26 inviolate the right to express opposition to what Government is

1 doing. For in this case, the constitutional right of which
2 Bryson was deprived is contained in the original Constitution
3 itself; indeed, in the very first Article, which reads:

4 "No Bill of Attainder or ex post facto law
5 shall be passed." (Article I, Section 9,
6 Clause 3)

7 This constitutional provision, unlike some others, has had no
8 history that might be called hectic or volatile. The cases
9 decided under it can be numbered on the fingers of one's
10 hands; and save for the decision in Douds, all the cases sup-
11 port the applicability to Bryson of the protections of Article
12 I. "Never before has this court held that the Government
13 could for any reason attain persons for their political
14 beliefs or affiliations. It does so today." (Mr. Justice
15 Black, in dissent, A.C.A. v. Douds, 339 U.S. 382, 449 [1950])

16 The Government's argument concerning "stability" was
17 likewise made before the district court. That court concluded
18 that the considerations urged by the Government were inap-
19 plicable to this case, for one thing because no threat of mass
20 relitigation exists, inasmuch as section 9(h) has long since
21 been repealed; for another, because even in this case, the
22 result of granting relief to Bryson will not entail a retrial
23 of the criminal charges. A decision that 9(h) is uncon-
24 stitutional as applied to Bryson bars all further litigation.
25 That being so, there seems to be little reason for this
26 court to concern itself with what, in final analysis, is
little more than a scarecrow. It is enough that, in this case

1 and on this record, the fears of the Government are groundless.
2

3 CONCLUSION

4 For the foregoing reasons, the order setting aside the
5 conviction and sentence should be affirmed.

6 DATED: August 19, 1968
7 San Francisco, California

8 Respectfully submitted

9 GLADSTEIN, ANDERSEN, LEONARD
& SIBBETT

10 By

11 Richard Gladstein

12 Norman Leonard

13 Attorneys for Appellee.

14 CERTIFICATE OF COUNSEL

15 I certify that, in connection with the preparation of
16 this brief, I have examined Rules 18 and 19 of the United
17 States Court of Appeals for the Ninth Circuit, and that, in
18 my opinion, the foregoing brief is in full compliance with
19 those rules.

20 Richard Gladstein

21 Attorney for Appellee.
22
23
24
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1
2 CERTIFICATE OF SERVICE
3

4 This is to certify that a copy of the foregoing Brief
5 for Appellee was this date mailed to the following: (3 copies)

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22474

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

HUGH BRYSON,

Appellee.

NO. ~~20803~~

OPENING BRIEF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellant,	)	NO. 20803
)	
v.)	
	)	<u>OPENING BRIEF OF APPELLANT</u>
HUGH BRYSON,)	
)	
Appellee.)	

JURISDICTION

The appellee filed in the District Court a "Motion for Writ of Error Coram Nobis to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for other Requested Relief" (R. 1-10) ^{1/}. November 6, 1967, the District Court entered an Order setting aside petitioner's (appellee's) conviction and sentence, that he be released from parole and that he be relieved of the remaining portion of his fine (R. 92) ^{2/}. On December 4, 1967, the United States filed a notice of appeal to this Court (R. 93). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

1/ References designated "R_" are to the Transcript of Record on file with this Court.

2/ The opinion and order has not been reported. It appears in the Transcript of Record at R. 77-92.

STATEMENT OF THE CASE

The appellee was indicted and convicted for violating 18 U.S.C.
1001 3 / (R. 77). The conviction was affirmed by this Court. Bryson
v. United States, 238 F.2d 657; 243 F.2d 837, cert. den. 355 U.S. 817.
Denial of a motion for reduction of sentence was affirmed, Bryson v.
United States, 265 F.2d 9, cert. den. 360 U.S. 919 (R. 2-3). On
May 24, 1967 (R. 1) the appellee filed the motion which resulted in
the order now on appeal, as just stated.

STATUTES INVOLVED

18 U.S.C. 1001 Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (formerly 29 U.S.C. (1958 ed.) 159 (h)), which was repealed by Section 201(d) of the Labor-Management

3 / The District Court referred to Section 1001 as "the general federal perjury statute (R. 77). The section defines the offense to include the making of false writings "in any matter within the jurisdiction of any department or agency of the United States"

Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of /sections 286, 287, 1001, 1022 and 1023 of Title 18/ shall be applicable in respect to such affidavits.

Section 504 of 29 U.S.C., as amended in 1959, provided in pertinent part:

§ 504. Prohibition against certain persons holding office; violations and penalties.

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve-

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *

* * * * *

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment * * *.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court did not have jurisdiction under Section 2255 of Title 28 U.S.C. to vacate appellee's sentence.
2. The District Court erred in holding that it had not had jurisdiction to convict and sentence the appellee under 18 U.S.C. 1001.
3. The District Court erred in basing its Order on a holding that Section 9(h) of the Taft-Hartley Act was unconstitutional.
4. The District Court erred in holding Section 9(h) unconstitutional, because:
 - a. Section 9(h) was not a bill of attainder;
 - b. The word "affiliated" in Section 9(h) was not "overbroad." Killian v. United States, 368 U.S. 231; Bryson v. United States, 238 F.2d 657 (C.A. 9).

SUMMARY OF ARGUMENT

The District Court vacated appellee's conviction on the ground that: (1) Congress did not intend that Section 1001 of Title 18 U.S.C. should apply to the filing of false statements under an unconstitutional statute, and, (2) Section 9(h) of the Taft-Hartley Act of 1947, which was repealed in 1959, was unconstitutional as a bill of attainder, and (3) Section 9(h) was also unconstitutional insofar as it called for filing an affidavit with the National Labor Relations Board that the

union officer filing the affidavit was not "affiliated" with the Communist Party. The court said that the term "affiliated" was "overbroad" and could not be a basis for a criminal conviction.

We submit that the District Court erred on all four grounds we have stated: (1) There was no jurisdiction in the District Court to vacate sentence under Section 2255 of Title 28 U.S.C. because appellant was not "in custody", as that term is defined by the case law; (2) Whether Section 9(h) was constitutional or not, an indictment charging a violation of 18 U.S.C. 1001 stated a crime against the United States,^{4 /} as the Supreme Court in effect held in 1966. Dennis v. United States, 384 U.S. 855, 864-867; (3) As of the date when Bryson filed his false affidavit with the Labor Board the law as stated by the Supreme Court was that Section 9(h) was not a bill of attainder and the filing of a false affidavit was a deliberate flouting of that law. Dennis v. United States, supra; (4) The term "affiliated" as used in the context of Section 9(h) was not ambiguous or "overbroad" and had a well settled and understood meaning in the law. Killian v. United States, 368 U.S. 231, 254-258.

4 / A violation of 1001 is not "perjury", although the District Court said the conviction was for perjury (R. 77). See, Fisher v. United States, 231 F.2d 99, 105-106 (C.A. 9); Sells v. United States, 262 F.2d 815, 821-822 (C.A. 10), cert. den., 360 U.S. 913.

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION
UNDER SECTION 2255 OF TITLE 28 U.S.C. TO
VACATE APPELLEE'S SENTENCE

Section 2255 of Title 28 U.S.C. provides the collateral attack procedure for "a prisoner in custody under sentence," in the same manner and scope as habeas corpus. For a convicted federal offender, it is the equivalent of habeas corpus. United States v. Hayman, 342 U.S. 205 (1952).

It has been uniformly held that to invoke the jurisdiction of the court, some form of custody is necessary. From an early view that only institutional confinement would suffice to be able to allege custody ^{5/}, the meaning has broadened to encompass restraint under parole and probation. ^{6/}

However, there must be a provable allegation of "custody" in order to proceed under Section 2255, and appellee was not - under any view - in custody when this petition was filed. Bryson had been imprisoned, paroled, and discharged by operation of law prior to filing this motion. Unless the United States could have come to a court

^{5/} Van Meter v. Sanford, 99 F. 2d 511 (C.A. 5, 1938); Owens v. United States, 174 F. 2d 469, 470 (concurring opinion) (C.A. 5, 1949).

^{6/} Parole is "custody": Jones v. Cunningham, 371 U.S. 236 (1963). This Circuit reached such a conclusion prior to Jones in Hoptowit v. United States, 274 F. 2d 936, 938 (C.A. 9, 1960). Probation is "custody" in the Second Circuit, United States v. Re, 372 F. 2d 641 (1966), but being on bail is not "custody" in this Circuit. Matysek v. United States, 339 F. 2d 389 (1964).

in 1967 and asked for a warrant to incarcerate Bryson for non-payment of the fine, Bryson cannot claim any restraint upon his liberty.

Bryson surrendered to the United States Marshal in January 1958 to serve a five year sentence imposed by the District Court. His sentence began when he was received at the institution designated by the Attorney General (18 U.S.C. Sections 3568, 4082(a)). He was released upon parole in December of 1959, pursuant to 18 U.S.C. Sections 4202 and 4203. Under 18 U.S.C. Section 4164, he would remain as if on parole until the expiration of five years. At that time, he is discharged (Cf. 18 U.S.C. Section 4163).

Bryson was free of all restraint in January 1963.

The maximum period for which Bryson could be imprisoned - absent bad conduct on his part - was five years less 180 days (18 U.S.C. Section 4164). During the last 180 days he is deemed as if on parole, and jurisdiction may be asserted over him on that basis. Singleton v. Looney, 218 F. 2d 526 (C.A. 10, 1955). But once he passes the 180 day period, there is no jurisdiction over him. After January 1963, the United States had but one remedy to enforce payment of the fine - civil suit.

It is possible to argue that during the five year period after sentence, Bryson could have been imprisoned for nonpayment; e.g., a two year sentence could have been imposed, with the condition that the defendant stand committed until the fine was paid. This could conceivably vest the court with jurisdiction to imprison the defendant up to the maximum term which could have been imposed under the statute,

five years, unless the defendant discharged the fine obligation through a pauper's oath. (18 U.S.C. Sections 3565 and 3569). Should Bryson have been released from the two year sentence, the United States could have sought to imprison him for nonpayment during the remainder of the maximum term possible under the statute. 7/

The Board of Parole continued to assert jurisdiction over Bryson after 1963. However, it is obvious that it could not imprison him from, for example, the day he filed his present petition until this matter is decided. Of course, it did not do so, and it is for this very reason that he cannot claim to be "in custody" under any construction of those words to date.

Bryson cannot assert to this Court that an order releasing him from custody could be directed to anyone - there is no respondent to an order. Habeas corpus, and Section 2255, require a situation in which such an order could command release from someone's restraint. None is possible here. Compare: Ex Parte Endo, 323 U.S. 283, 304 (1944).

The relief sought under Section 2255 must therefore be denied for lack of jurisdiction.

7/ Cf.: United States v. Gottfried, 197 F. 2d 239 (C.A. 2, 1952). Gottfried notes that the Board of Parole can assert jurisdiction over a defendant who has not paid a "committed fine" for the period of imprisonment "plus any further period until the fine is paid or otherwise discharged according to law." 197 F. 2d 241. A "committed fine" is one where the judgment directs imprisonment until the fine is paid. 18 U.S.C. Section 3565; Cohen v. United States, 7 L. ed. 2d 518, 520 (1962). This Circuit, in Panno v. United States, 203 F. 2d 504, 509-510 (1953), and Callahan v. United States, 371 F. 2d 658 (1967), noted the provisions of Section 3565 of Title 18 U.S.C., but was not dealing with expired periods of penalty. United States v. Baird, 241 F. 2d 170 (C.A. 2, 1957), suggests that imprisonment past the expired term could occur, as an incident of contempt power. But Baird was not concerned with the issue herein. Whether imprisonment on a contempt theory, in a period outside the limits set by the penalty statute, could result must be considered in the light of Shillitani v. United States, 384 U.S. 364, and Cheff v. Schnackenberg, 384 U.S. 373 (1966).

II. WHETHER SECTION 9(h) OF THE TAFT-HARTLEY ACT WAS CONSTITUTIONAL OR UNCONSTITUTIONAL, THE COURT WHICH TRIED, CONVICTED, AND SENTENCED BRYSON FOR VIOLATION OF 18 U.S.C. 1001 HAD JURISDICTION.

The net effect of the District Court's opinion is: Section 9(h) of the Taft Hartley Act 8/ was unconstitutional, so it was "no law", and gave the same court when it tried Bryson no jurisdiction, although as of the time of Bryson's affidavit and of his trial, the Supreme Court in American Communications Assn. v. Douds, 339 U.S. 382, had held Section 9(h) constitutional. See also, Osman v. Douds, 339 U.S. 846 (as to "membership" and "affiliation")

Even assuming for the sake of argument that the decision of the Supreme Court in 1965, in United States v. Brown, 380 U.S.437, calls in question the continued validity of the Douds cases as constitutional law, the court's ruling runs counter to the 1966 decision of the Supreme Court in Dennis v. United States, 384 U.S. 855, in which the very question of the applicability of the provisions of 18 U.S.C. 1001 to the filing of false affidavits under Section 9(h) was presented. The Court, referring to United States v. Brown, supra, decided (pp. 864-867) that it was unnecessary to reconsider Douds, "because the claim of invalidity of Par. 9(h) would be no defense to the crime of conspiracy charged in this indictment" (p. 867).

8/ Enacted in 1947, repealed in 1959.

The Court stated:

"It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. * * * There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge;" citing Kay v. United States, 303 U.S. 1.6; 9 / United States v. Kapp, 302 U.S. 214; United States v. Williams, 341 U.S. 58; United States v. Remington, 208 F.2d 567, 569 (C.A. 2d Cir., 1953), cert. den. 347 U.S. 913; United States v. Winter, 348 F.2d 204, 208-210 (C.A. 2d Cir. 1965), cert. den., 382 U.S. 955.

The Court went on to say:

"Petitioners seek to distinguish these cases on the ground that in the present case the constitutional challenge is to the propriety of the very question - Communist Party membership and affiliation-which petitioners are accused of answering falsely. We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's fraud. It is not an action to enforce the statute claimed to be unconstitutional." (emphasis added)

9 / In Kay the Court said, "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without Constitutional sanction."

Dennis was a case of conspiracy to defraud the United States, in which 6 defendants were convicted.^{10/} The District Court attempted to distinguish Dennis by saying that the conduct of the defendants in that case was "particularly onerous" (R. 86-87). In the present case, the court said, Bryson's conduct was "less onerous", so he was entitled to urge 9(h) was unconstitutional (R. 86-87). Bryson's false affidavit, of course, can be said to be "less onerous" if we consider 6 false affidavits to weigh more than one. In Dennis, the Court said, the defendants' "knew and believed that they were lying as to their membership in the Party and that they were defrauding the government. In contrast, Bryson has at all times denied the falsity of his affidavit, while in Dennis only the conspiracy was factually challenged" (R. 85). The fact is that in Dennis all the convicted defendants entered a general plea of "not guilty" and put the government to its proof of falsity as well as of conspiracy or agreement. Bryson, like the Dennis defendants, filed a false affidavit in order to secure for his union, as well as for himself, the advantages of access to the facilities of the Labor Board (Leedom v. International Union, 352 U.S. 145) and, like them, he pleaded "not guilty". Filing a false statement is a separate offense in the Code from a conspiracy to defraud or to commit offenses, but Congress did not distinguish

^{10/} In a similar case, West v. United States, 274 F.2d 885 (C.A. 6) cert. den., 365 U.S. 811, defendants filing false affidavits were convicted of a conspiracy to commit an offense against the United States.

between them when it came to prescribing penalties. The maximum statutory penalty is as great for a violation of Section 1001 as for a violation of Section 371; one is as "onerous" as the other. To an indictment under neither section is the asserted unconstitutionality of Section 9(h) a defense.

This Court twice affirmed Bryson's conviction, and we are justified in assuming that there was competent and substantial evidence to sustain the verdict. (Glasser v. United States, 315 U.S. 60; Carlson v. United States, 187 F.2d 366, 370 (C.A. 10), cert. den. 341 U.S. 940); and it follows from the verdict that the falsity of Bryson's statement was willful and knowing as required by the language of Section 1001.

The District Court interpreted 1001 as protecting only the functions of government authorized by a statute which was constitutional, as of 1967, citing United States v. Gilliland, 312 U.S. 86 and Ogden v. United States, 303 F.2d 724 (C.A. 9, 1962) (R 90); holding Section 9(h) to have been unconstitutional, it inferred that Congress did not intend that 1001 apply in such a situation (R 92).

That conclusion is contrary to the course of authority. All that the opinion in Gilliland does is recite the language of the statute; it does not interpret the word "authorized", and it does not say "only". In Dennis the Court dealt with the point and said that the argument here made by appellee "assumes that for purposes of

Section 371, a governmental function may be said to be 'unlawful' even though it is required by statute and carries the fresh imprimatur of this Court" (p. 867).^{11/}

The rule of "colorable authority" has been frequently applied in cases under Section 1001. See, Humble Oil and Refining Company v. United States, 198 F.2d 753, 756 (C.A. 10), and cases cited. It is but another way of stating that under 1001 the constitutionality of the underlying statute is not an issue.

The administration of justice as a practical matter must take into account practical considerations and limitations. The Supreme Court has not interpreted the Constitution as calling for the broad, unqualified application of the rule of retroactivity of a determination of unconstitutionality.

^{11/} In Ogden v. United States, supra, this Court said:
"One who has given false answers to material inquiries regarding a matter colorably within the authority of a government agency may not defend a subsequent prosecution under 18 U.S.C.A. Par. 1001 on the ground that the governmental operations involved were in fact vulnerable to constitutional attack" (p. 731), and it also said (p. 731 n 18); "...in this criminal prosecution for false denial of membership or affiliation with a single organization, we are not concerned with whether defendant might have resisted the inquiry into his organizational associations on the ground that it was unjustifiably broad".

The actual existence of a statute, prior to such a determination is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.

* * * * *

/District Courts'/ determination of such questions, while open to direct review, may not be assailed collaterally. Chicot County Dist. v. Bank, 308 U.S. 371, 374, 376.

See also, Warring v. Colpoys, 122 F. 2d 642 (C.A.D.C.), cert. den. 314 U.S. 678. And in the recent case of Johnson v. New Jersey, 384 U.S. 719, 728, the Court said that it is not to disparage in any way a constitutional guarantee by declining to apply it retroactively, it is a matter of the practical administration of justice. Section 9(h) was on the statute books for some 12 years, and the digests and the annotated Code disclose the substantial number of cases in which it was interpreted and applied. 12 /

Applying the practical approach of the Chicot and Johnson cases we suggest that to vacate and set aside a 12 year old conviction (1955), which was affirmed by this Court and in which the appellant there (appellee here) made the same contentions he has advanced here, is to open a Pandora's box of problems and troubles. The Supreme Court denied certiorari, and no judgment of conviction was ever more final than Bryson's. To sustain the judgment of the District Court in the present proceeding may well lead to developments in the law of the finality of judgments, in the law of attainders, and in the interpretation of the First Amendment, which we cannot even imagine - and

12 / The District Court pointed out that "No case has held Section 9 unconstitutional" (R. 83), and then proceeded to do just that.

all in a case which the question of constitutionality was not an issue and should not have been considered.

III. SECTION 9(h) OF THE TAFT-HARTLEY ACT WAS CONSTITUTIONAL

We have demonstrated that the District Court erred in deciding the question of the constitutionality of Section 9(h) of the Taft-Hartley Act. Whether that section was constitutional or unconstitutional was not an issue properly to be considered under an indictment for violation of Section 1001. In order, however, to present a complete statement of the Government's position, we propose to argue that, despite United States v. Brown, supra, and the other recent cases relating to the First Amendment cited by the District Judge, Section 9(h) was a constitutional and valid statute of the United States while it was on the books.

a. Section 9(h) was not a bill of attainder

We must note that the statute invalidated as a bill of attainder in United States v. Brown was not Section 9(h), which had been repealed in 1959, but a successor statute with much the same objective, but quite different from 9(h) in structure and application. Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 - which was before the Court in Brown (supra, p. 9) said, in effect to members and affiliates of the Communist Party - "You are forbidden to serve as union officers." Congress had named the Communist Party "in no uncertain terms" and had directed that its members "cannot hold union office without incurring criminal liability," 381 U.S. at 450.

This, the Court held, violated the constitutional rule that prohibits Congress from "specifying the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461.

In contrast, Section 9(h) said, "If you serve as union officers, your union will be unable to use the facilities of the National Labor Relations Board." The later Act imposed a prohibition, plus a criminal penalty; 9(h) was described by the Court in Douds as a "discouragement" (339 U.S. at 402).

This distinction is relevant to the question whether Section 9(h) constituted a bill of attainder. Congress must often impose restrictions of various kinds on the basis of legislative findings which "specify the people upon whom the restriction is levied", 381 U.S. at 461. Yet not every such restriction must fall as a bill of attainder, although every restriction or regulation may be felt as a deprivation or a punishment by those regulated. See, Wickard v. Filburn, 317 U.S. 111, 133.

Congress has provided in 28 U.S.C. 458, for example, that "no person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." The statute marks out two very definite classes - i.e., judicial officers and their close relatives - it does not impose criminal sanctions upon either. It disqualifies brothers and sisters of judges from holding office in their relatives' courts, but that restriction can

hardly be deemed the sort of "deprivation" to which the constitutional bill-of-attainder provision applies. Nor, we submit, can it be claimed that the bill-of-attainder clause is violated by 5 U.S.C. 118i, which states, "n/o officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." Although federal employees are by statute deprived of the right to participate in political campaigns such regulation of their activity is not sufficiently substantial to offend the bill-of-attainder clause.

In both of the instances cited Congress was obviously concerned with evils which might be caused by persons other than those in the group specifically described in the statute and which are not necessarily produced by all those persons who are within the group. Yet in each instance Congress has made a legislative finding which has narrowed the group to which the statutory restriction applies.

We submit that even under the Brown decision the nature of the "deprivation" is a material element in determining the statute's constitutionality. Where, as under Section 9(h), the statute imposes no immediate criminal sanction, but merely acts as an indirect "discouragement," the effect is more regulatory than punitive, and it is not, therefore, sufficiently substantial to invalidate Congress' legislative determination regarding the scope of the evil.

b. "Affiliated" in Section 9(h) was not "Overbroad"

The District Court added to "bill of attainder" as a second ground for the invalidity of Section 9(h): that the word "affiliated" was "ambiguous" (R. 85) and "overbroad" (R. 89), so as to infringe appellee's rights of speech and assembly under the First Amendment. R. 88-89, citing cases like Keyishian v. Board of Regents, 385 U.S. 589; Elfbrandt v. Russell, 384 U.S. 11; Aptheker v. Secretary of State, 378 U.S. 500, and other cases (R. 88-89).

Taking "overbroad" at what would seem to be its ordinary meaning in everyday speech, it means, we think, "vague and insufficiently precise to inform a person subject to it of his rights and obligations." See, for a frequently cited case, Winters v. New York, 333 U.S. 507, cited in Dombrowski v. Pfister, 380 U.S. 479, 491, n. 7.^{13/}

Obviously, few words, if any, are as precise and invariable in meaning as we might like to have them. "Affiliated," however, has had a well-settled and definite meaning in law in contexts dealing with the relationships of individuals to organizations, and, specifically,

^{13/} The District Court noted the suggestion made by Bryson that at his trial, the jury requested, and was refused, a dictionary to seek help in defining "affiliation." In Fisher v. United States, 231 F. 2d 99, Chief Judge Denman for this Court disapproved of the reading to the jury of a dictionary definition of "membership" (231 F. 2d at 107), as being inadequate.

Winters used the words "vague and indefinite"; "overbroad" had not yet been coined.

as used in Section 9(h). In Killian v. United States, 368 U.S. 231, a Seventh Circuit case for violation of 1001, decided in 1961, the Court approved an instruction which read in part:

"The verb 'affiliated,' as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis." 368 U.S. at 254-255, n. 13.

The Court noted that, "In Bryson v. United States, 238 F. 2d 657, 664, the United States Court of Appeals for the Ninth Circuit found an identical instruction to be 'full and complete' and said that it 'adequately informed the jury of the meaning of the term /affiliated/ and provided an adequate standard for evaluating the evidence.'" (p. 256).

In addition the Court in Killian cited as supporting the instruction as to the meaning of "affiliation," the opinion of Justice Burton in Jencks v. United States, 353 U.S. 657, which referred to "affiliation" as requiring a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for a charge of a breach of good faith'" (368 U.S. at 255) and opinions of Courts of Appeals in the Sixth and Tenth Circuits, and pointed out that "affiliated with" is

"necessarily subjective," but is a fact which may be proved by evidence of objective facts and circumstances (368 U.S. at 257).^{14/}

When Bryson in 1951 signed the affidavit which was the basis for his conviction he was experienced in the labor movement and he consulted with counsel (265 F. 2d 9, 11-12 (C.A. 9), cert. den., 360 U.S. 919); there can be no doubt that he was cognizant of the Supreme Court decision in Douds.

In Aptheker v. United States, 378 U.S. 500, the Court did not pass upon the First Amendment questions mentioned by the District Court and the opinion does not support the argument that Section 9(h) was invalid on that ground (p. 504). In Aptheker it was conceded that the restriction imposed by the statute directly affected "the right to travel * * * protected by the Fifth Amendment" (378 U.S. at 505), and the principal issue was whether the restriction upon this constitutionally protected liberty amounted to "reasonable regulation" (ibid.). The parallel freedom in this case is the freedom to serve as a union officer - which has not been expressly

^{14/} The Court in Killian also traced the definition of "affiliated" back to the early case of U.S. ex rel Kettner v. Reimer, 79 F. 2d 315 (C.A. 2), and Bridges v. Wixon, 326 U.S. 135 (368 U.S. at 256, n. 14).

The District Court stated that in Douds Justice Frankfurter indicated doubts as to whether "membership" and "affiliation" stood "on equal constitutional footing" (R. 85, 86). The text of the opinion (339 U.S. at 420) indicates that Justice Frankfurter's doubts related rather to that part of Section 9(h) which called for an oath dealing with "beliefs" rather than to "membership in, or affiliation with" the Communist Party. See the companion case of Osman v. Douds, 339 U.S. 846, 847.

or impliedly recognized by any court as a constitutionally guaranteed "liberty."

There are other differences between this case and Aptheker. The Court noted in Aptheker, the statute in that case applied "whether or not the [Communist Party] member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or 'Communist-front' organization." 378 U.S. 509-510. Section 9(h) obviously applies only to knowing members and affiliates of the Communist Party.^{15/} In addition, the statute held invalid in Aptheker effectively prohibited foreign travel by Communist Party members irrespective of the purpose of the travel. 378 U.S. at 511-512. Section 9(h) was confined to particularized conduct (union officership) which presents a specific evil (the danger of political strikes). Hence, Section 9(h) was "more discriminately tailored to the constitutional liberties of individuals" (378 U.S. at 514) than the passport restrictions in Aptheker.

It is true that one of the vices of the statute held unconstitutional on its face in Aptheker was that it "rendered irrelevant the member's degree of activity in the organization and his commitment to its purpose" (378 U.S. at 510), and Section 9(h) in this case is similar, in that respect, to the statute involved in Aptheker (378 U.S. at 510). But an important element in the Aptheker decision was the Court's conclusion that the end

^{15/} The terms "Communist-action" and "Communist-front" occur in the Internal Security Act of 1950, 50 U.S.C. Sec. 785, which was in question in Aptheker.

which Congress wished to achieve - i.e., to restrict the freedom of Communist agents to travel abroad and act as courier for ventures in espionage or sabotage - could have been achieved by considering membership in the Communist Party not as an absolute disqualification but as "one factor to be weighed" (378 U.S. at 513) in the passport screening process - as in federal employment. In Section 9(h), however, Congress, weighing all the factors pro and con, eschewed such an administrative screening process (Leedom v. International Union, 352 U.S. 145), and chose instead to subject the filing of affidavit to the sanctions of Section 1001. Congress acted reasonably and properly in this area, taking all the factors into account, by making affiliation (or membership) the touchstone, subject to a restriction against false statements.

The District Court also cited Scales v. United States, 367 U.S. 203, as an authority for requiring a "specific intent" (R. 88-89). In Scales the Court read the requirement of "specific intent" into the criminal statute itself (367 U.S. at 224-228). In 9(h), by invoking Section 1001, it brought into play that statute's own "specific intent," "knowingly and willfully," and the knowing falsity of the statement made. ^{16/}

The District Court also stated that, "To question one merely about his membership or affiliation violates the First Amendment" (R. 88). As phrased the statement is certainly too sweeping. See,

^{16/} It is, of course, not necessary that the fraud or deceit practiced by the statement involve a pecuniary loss to the United States. Humble Oil & Refining Co. v. United States, 198 F. 2d 733 (C.A. 10), and cases cited.

Barenblatt v. United States, 360 U.S. 109, 126-128; Wilkinson v. United States, 365 U.S. 399, 413-415; Braden v. United States, 365 U.S. 431, 433-435. ^{17/}

The complete answer to appellee's contentions is that it was not necessary to consider the constitutionality of Section 9(h). Appellee was convicted by a jury of a willful and knowing violation of Section 1001 of Title 18, and questions regarding the validity of his conviction and the construction or constitutionality of Section 9(h) are irrelevant. Dennis v. United States, 384 U.S. 855.

^{17/} In some of the cases cited by the Court involving State statutes and regulations the very complexity of the enactment and wide sweep of the language might have justified a reversal (for examples, Keyishian v. Board of Regents, 385 U.S. 589; Dombrowski v. Pfister, 380 U.S. 479), at least on Fifth Amendment grounds, and possibly the First Amendment and for the reason that they applied too broadly. See, Cole v. Young, 351 U.S. 536, 554.

CONCLUSION

For the reason stated, it is submitted that the order of the District Court should be set aside and the conviction and sentence of the trial court re-instated.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JERROLD M. LADAR
Assistant United States Attorney

- - - - -
CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing Opening Brief of Appellant was this date mailed to the following: (3 copies)

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Attorney for Appellee.

DATED: May 20, 1968.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT O. GILMORE, JR.,

Appellant,

, vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA, et al.,

Appellee.

No. 22478

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT O. GILMORE, JR.,

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vs.

THE PEOPLE OF THE STATE OF
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Appellee.

No. 22478

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause is issued.

STATEMENT OF THE CASE

A. Proceedings in State Courts

On July 18, 1961, appellant Robert O. Gilmore, Jr., was convicted in the Superior Court of Los Angeles County

upon his plea of guilty while represented by privately retained counsel, of the felony offenses of rape and first degree robbery in violation of California Penal Code sections 261.3 and 211, respectively. He was sentenced on the same date to imprisonment in the State Prison for the term prescribed by law (CT 83).

Appellant did not appeal the above conviction. Rather, approximately three years later he filed a petition for a writ of habeas corpus in the Superior Court of Monterey. That petition was denied without hearing on October 23, 1964. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court which also was denied without hearing on May 12, 1965. Substantially the same factual and legal issues presented to the court below were raised in those petitions.

On February 6, 1967, appellant filed a petition for writ of habeas corpus in the Superior Court of Marin County. This petition was denied without opinion on February 7, 1967. In this petition appellant challenged the propriety of certain actions by the California Adult Authority. On February 24, 1967, appellant, asserting the same contentions that he had urged in his petition before the Superior Court of

Marin County, filed a petition for a writ of habeas corpus in the Supreme Court of California. This petition was denied March 8, 1967.

B. Proceedings in the Federal Courts

On June 18, 1965, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT, Vol. 1, 2-43). An Order to Show Cause was issued by Judge Wollenberg of that court on that same date (CT, Vol. 1, 44), and on July 22, 1965, appellee filed a return to the Order to Show Cause (CT, Vol. 1, 28-83).

On August 18, 1965, the District Court issued an Order Discharging the Order to Show Cause and denying appellant's petition (CT, Vol. 1, 166-168). A timely notice of appeal was filed by appellant on August 26, 1965 (CT, Vol. 1, 169-181). On September 1, 1965, an order was issued by Judge Wollenberg granting appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis (CT, Vol. 1, 190). This Court reversed and remanded the case for determination of whether appellant's trial attorney deceived appellant into entering a plea of guilty. Gilmore v. California, 364 F.2d 916 (9th Cir. 1966).

An evidentiary hearing was held in the Federal District Court on April 27, 1967 (CT, Vol. II, 3-63). On October 27, 1967, Judge Wollenberg issued an order denying appellant's petition for writ of habeas corpus (CT, Vol. 1, 276-281). On November 27, 1967, an order granting appellant's application for a certificate of probable cause was issued and appellant was allowed to appeal in forma pauperis (CT, Vol. 1, 314).

APPELLANT'S CONTENTIONS

1. Appellant's pleas of guilt were the result of unlawful coercion.

2. California's kidnapping statute is unconstitutional.

SUMMARY OF APPELLEE'S ARGUMENT

1. The District Court finding that appellant entered his plea of guilt through no deception of his trial attorney should not be disturbed on this appeal.

2. Appellant's remaining allegations are not properly before the court and are without merit.

ARGUMENT

I

THE DISTRICT COURT FINDING THAT
APPELLANT ENTERED HIS PLEA OF
GUILT THROUGH NO DECEPTION OF HIS
TRIAL ATTORNEY SHOULD NOT BE
DISTURBED ON THIS APPEAL.

At the evidentiary hearing appellant's trial attorney, Gladys Tooles Root, testified that she had told appellant that she had been successful in reaching a compromise with the Deputy District Attorney. The compromise was to the effect that if appellant would plead guilty to the charge of first degree robbery and to the charge of rape, then he would not be charged with two attempted robberies, simple kidnapping, and kidnapping for the purpose of robbery (CT, Vol. II, 53). Mrs. Root further testified that she explained to appellant that the amended information which would contain the robbery and rape counts would involve the same complaining witness (CT, Vol. II, 53). Mrs. Root also testified that she had discussed the full nature of the charges against appellant and went over each amendment of the information with him (CT, Vol. II 60-61).

Prior to the compromise the District Attorney's Office was seeking the death penalty. This fact, coupled

with her opinion that a conviction would be inevitable, led Mrs. Root to advise appellant to plead guilty (CT Vol. II, 54-56). Appellant accepted this advice. At no time, Mrs. Root testified, did she threaten to withdraw if appellant refused to plead guilty or did she promise him with a county jail sentence (CT Vol. II 52, 54).

Appellant contradicted Mrs. Root's testimony. However, the District Court, stating as follows, chose to believe her;

"Petitioner's main contention and the question left open by the Court of Appeals for this Court to decide, is whether a 'deal' had been made between the judge, the district attorney, and petitioner's counsel that if he pleaded guilty to the rape and robbery charges, he would receive only one year in the county jail. This Court is of the opinion that no 'deal' as alleged by petitioner was ever made. The only 'deal' that was made was for petitioner to plead guilty to two of the seven counts of the second amended information in return for a dismissal of the remaining five counts, two of which involved kidnapping offenses. In fact, this is what occurred, and the Court of Appeals

has already stated that there is no element of coercion in this situation. Gilmore v. People, supra, at p. 918.

"Mrs. Root, his attorney, denied that any such deal as testified to by petitioner was ever made. Petitioner must have been fully aware that no 'deal' had been made regarding the possibility of a one year county jail sentence as is shown by the transcript of proceedings wherein petitioner pleaded guilty and was thereafter sentenced to the state prison. (Respondent's Exhibit B, introduced into evidence at the hearing). Petitioner waived his right to have a probation report and agreed to be sentenced immediately following his plea. At this time, the Court advised him that he would be sentenced to the state prison, that the law provided a penitentiary sentence. It seems incredible that if, as petitioner alleges, there was in fact a 'deal', that he did not state anything at the time sentence was imposed. His testimony at the hearing herein was that he had been involved in other criminal proceedings. It

would seem, then, that he would know the difference between a county jail term and a state prison or penitentiary term."

(CT 279-280).

This finding of the District Court, supported as it is by substantial evidence, is binding on this Court. Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965) cert. den. 382 U.S. 866; Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941), cert. den. 314 U.S. 675.

II

APPELLANT'S REMAINING ALLEGATIONS
ARE WITHOUT MERIT AND ARE NOT
PROPERLY BEFORE THE COURT.

Although this Court reversed the District Court's order for the limited purpose of holding an evidentiary hearing to determine whether appellant was deceived by his trial attorney (Gilmore v. California, 364 F.2d 916 (1966)), appellant has raised additional issues in his post hearing brief and in his brief on appeal. Accordingly, respondent submits that these issues are not properly before the court. Nevertheless, the new arguments are without merit.

Appellant questions the constitutionality of California's kidnapping statute (Cal. Pen. Code

§ 209) in light of United States v. Jackson, 262 F. Supp. 716 (D. Conn. 1967) where it was held that the federal kidnapping statute (Title 18 U.S.C. § 1201 (a)) denied a defendant his right to a jury trial. The reasoning of Jackson is that since under federal law in a conviction of kidnapping by the court a death sentence could not be imposed whereas in a jury trial it could, a defendant was unconstitutionally coerced into accepting a court trial. Aside from the fact that Jackson has been questioned, (See, Robinson v. United States, 264 F.Supp. 146 (W.D. Ky. 1967)), as the District Court properly noted, Jackson does not apply in California, for when a defendant enters a plea of guilt to a kidnapping charge, the court can impose a death sentence. People v. Reeves, 64 Cal.2d 766 (1966). Also, as the District Court pointed out, the petitioner did not plead guilty to the kidnapping charge. That charge was dismissed after he pled guilty to the robbery and rape charges.

Appellant in his brief filed in this appeal for the first time questions the adequacy of his trial counsel. Mrs. Root testified that she investigated all aspects of the case and advised appellant to accept a compromise which she considered a satisfactory

alternative to the death penalty (CT Vol. II 54-56, 60-61). That Mrs. Root was successful in obtaining an amended indictment which contained only two counts rather than six, one of which carried the death penalty, is most indicative of the fact that appellant's representation was no sham or mockery of justice.

Appellant has not presented the question of the constitutionality of California's kidnapping statute or the adequacy of representation by his counsel at the state court proceedings. For this reason too, he is precluded from urging these contentions on this appeal. Schiers v. California, 333 F.2d 173 (9th Cir. 1964); Rose v. Dickson, 327 F.2d 27 (1964).

Appellant's additional allegations that he was "brow beaten," "inflicted with brutality" and coerced by the possibility of the death sentence itself have already been resolved against him by this Court. Gilmore v. California, 364 F.2d 916 (9th Cir. 1966).

CONCLUSION

For the foregoing reasons, appellee submits that the order of the District Court should be affirmed

and the proceedings herein dismissed.

Dated: April 5, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Michael Buzzell". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Buzzell".

MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Appellee

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1065

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: April 5, 1968.

A handwritten signature in cursive script, reading "Michael Buzzell".

MICHAEL BUZZELL
Deputy Attorney General

No. 22,479

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALVIN J. SMITH,

Appellant,

vs.

E. L. CORD, Individually, E. L. CORD, doing business as
Los Angeles Broadcasting Company,

Appellees.

On Appeal From the United States District Court for the
Central District of California.

BRIEF FOR APPELLANT.

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U.S. COURT OF APPEALS

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Appellees.

On Appeal From the United States District Court for the
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BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an interlocutory appeal from an order entered on September 26, 1967, by the United States District Court for the Central District of California, which order disqualified George O. West as attorney for appellant Calvin J. Smith [CT 92-94].¹ The underlying action is based upon a complaint filed on March 5, 1964, which alleged that appellee was indebted to appellant for money had and received in the sum of \$3,000,000,000 and also requested exemplary damages in the sum of \$3,000,000,000 for alleged fraud, malice

¹CT refers to the Clerk's Transcript on appeal.

and oppression by appellee. The District Court's jurisdiction was invoked under 28 U.S.C. 1332(a)(1).²

The District Court provided in paragraph four of its order [CT 95-96]:

"Pursuant to the provisions of 28 U.S.C. 1292(b) the order disqualifying Mr. West involves a controlling question of law as to which there is substantial grounds for difference of opinion, and an immediate appeal from that order may materially advance the ultimate determination of the litigation."

Although this statement is cited in the Notice of Appeal filed herein [CT 100, lines 23-26], appellant believes that the order is appealable under 28 U.S.C. 1291 since the order as to attorney West is final and the decision therefore belongs to that exceptional class of cases described in *Cohen v. Beneficial Indus. Loan Corp.*³ If this position proves incorrect appellant respectfully requests that the Court of Appeals permit the appeal pursuant to the discretionary provisions of 28 U.S.C. 1292-(b).

Statement of the Case.

1. History.

The action was filed on March 5, 1964, and appellant asked for general and punitive damages in a complaint based on a common count for money had and received.

²The present case has been before the Court twice. A summary of the action, together with the text statement, is found in *Cord v. Smith* (9th Cir. 1964), 338 F. 2d 516, 518. Also see Civil Docket herein, CT 115.

³(1949), 337 U.S. 541, 546; see also *Harman Drive-In Theatre v. Warner Bros. Pictures* (2d Cir. 1956), 239 F. 2d 555, 556.

Acting on appellee's petition under the All Writs Act, this Court made the following order on November 4, 1964:

"The trial court is directed to set aside the order denying the motion to disqualify and for injunctive orders, filed in the trial court on May 28, 1964, and further directed to order that Lyndol L. Young, Esq. shall not at any time, directly or indirectly and whether as attorney of record or not, represent, counsel or advise plaintiff Calvin J. Smith in connection with his action."⁴

The Court's mandate was spread in the District Court on April 26, 1965 [CT 115].

The application of the above mandate, however, was far from complete. After the mandate was spread attorney Young filed his own action in the District Court in which he incorporated by reference the action by appellant and further alleged that appellant had assigned to him one-half of appellant's cause of action against appellee. This complaint led ultimately to a clarification of the Court's mandate in the second case of *Cord v. Smith*.⁵ The Court there held, *inter alia*:

"We do hold that under our mandate, Young is not entitled to participate in the case in any manner, either as an attorney or as a party, or to maintain an action against Cord based upon the claimed assignment. And he may not, as we indicated in our prior opinion, assist Smith or his attorney by consultation or advice. The pending case of *Young v. Cord* should be dismissed."⁶

⁴*Cord*, footnote 2, *ante* p. 2, 338 F. 2d at 526.

⁵(9th Cir., 1966), 370 F. 2d 418.

⁶*Id.*, 370 F. 2d at 424.

In footnote 10 of the above decision the Court commented that Young had indicated, during oral argument, that he no longer desired to participate in the action either as a party or as an attorney, and further stated that “presumably, therefore, the case . . . can now proceed to trial in due course.”⁷ The concurring opinion of Circuit Judge Chambers was more prophetic: “I hope that the decision will permit Messrs. Smith and Cord to get on with their suit in the district court, but I am not sure it will.”⁸

The Court’s clarification of its mandate was duly spread on the records of the United States District Court on April 25, 1967 [CT 114].

2. Facts Underlying the Present Appeal.

Approximately three months after the Court’s mandate was spread, on July 24, 1967, appellee filed a Notice of Motion To Require Compliance With Mandate And Motion To Disqualify Plaintiff’s Attorney. This motion requested that the District Court determine whether the present attorney of record for appellant, attorney George O. West, was qualified to represent appellant [CT 15]. Affidavits in support [CT 16] and in opposition to this motion (filed separately with the Clerk of the Court) were filed by Milo V. Olson, and George O. West, respectively, and Mr. Olson later filed a reply affidavit [CT 81]. Appellee’s motion to disqualify was consolidated with appellee’s motion for change of venue and both came on for hearing on August 7, 1967 [RTD 4].⁹ In a written order filed

⁷*Id.*, 370 F. 2d at 424, footnote 10.

⁸*Id.*, 370 F. 2d at 425.

⁹RTD refers to the Reporter’s Transcript of disqualification hearing before the United States District Court on August 7, 1967.

September 26, 1967, the Honorable Warren J. Ferguson, judge presiding, entered an order disqualifying appellant's attorney George O. West [CT 94]. The Court stated [CT 94]:

"The totality of the circumstances have led this court to the conclusion that Mr. West simply cannot represent Smith without 'assistance by consultation or advice' from Mr. Young. Such assistance has been given in the past and there is no reason to believe that it will cease in the future."

Plaintiff Smith and his attorney George O. West filed their Notice of Appeal from this order on October 5, 1967 [CT 100].

The alleged "facts" used by appellee to support his motion to disqualify, and relied upon by the Honorable Warren J. Ferguson in reaching his decision, are discussed during the Argument as required.

Specification of Errors Relied On.

1. The District Court erred in disqualifying attorney George O. West because the evidence was insufficient to support such an order.

2. The District Court erred in denying appellant a hearing on the motion to disqualify and sufficient time to prepare and present witnesses and other evidence pertinent thereto.

ARGUMENT.

I.

The Evidence Introduced by Appellee Was Insufficient to Support the District Court's Order Disqualifying Attorney George O. West.

The only evidence presented to the District Court in support of the motion to disqualify is contained in the Affidavit and Reply Affidavit of Milo V. Olson, attorney for appellee [CT 16-36, 81-87]. The primary question on appeal is whether these affidavits contained sufficient facts to support the District Court's order of September 26, 1967, which disqualified George O. West as attorney for appellant Smith.

One point should be clarified prior to appellant's analysis of the evidence. The District Court did *not* rule that attorney West did not have the right to represent Smith. The Court held that Smith did not have the right to retain attorney West because this representation would violate the prior mandates of this Court due to the "close" relationship between attorneys West and Young [CT 93; see also discussion of this point at RTD 13-14]. That is, the question of whether a given party's second attorney could take any steps necessary to acquire confidential information from the party's first attorney, who has been disqualified due to his representation of an adverse party, would not seem to be directly presented by this appeal.

To support the motion to disqualify appellee presented approximately fifteen "facts" to the District Court, together with Points and Authorities and some correspondence with the American Bar Association which supposedly dealt with a problem involved in the present case [CT 79-80; 83-88]. Although the American Bar

Association informed attorney for appellee on June 5, 1967, that the "committee will not render opinions as to the ethics of conduct of a lawyer in a matter in which such conduct is involved in pending litigation" [CT 87], attorney Olson included the Association's later letter of July 1, 1967, in the Points and Authorities supporting the motion [CT 79-80]. Appellant will deal with this opinion of the American Bar Association as it arises.

The fifteen "facts" supporting appellee's motion can be analyzed under four general headings. Appellant realizes that individual acts, innocuous in themselves, can become greater than their sum when combined and sufficient to support a given judgment. However, appellant believes the following argument demonstrates how little evidence, if any, the affidavits contain to support the disqualification of attorney West. It is true that appellee's motion to disqualify was also directed toward the conduct of appellant Smith, which might justify a portion of attorney Olson's lengthy affidavit, but appellant submits that the affidavit was largely an attempt to remove attorney West because of mere physical proximity to Lyndol Young.

1. *Disqualification Due to Joint Appearance.* Appellee apparently condemns attorney West for physically appearing with Mr. Young on three different occasions. First, West appeared with Young at the deposition of West's client, appellant Smith, on June 23, 1965, and thereupon refused attorney Olson's demand that West request Young to leave [CT 16-17]. Young explained at the deposition that he was a party to the action since a complaint filed by him against Young had been consolidated with the present case. Mr. West refused to

ask Mr. Young to leave because he knew “of no legal basis at this moment” why he should accede to Olson’s demand [CT 17, lines 10-11]. The two actions had not in fact been consolidated even though they were both pending before the same judge.¹⁰ Appellant suggests that this incident only proves that Young and West both appeared in the same room and that attorney West was mistaken as to either the facts or the law. It certainly does not show either collusion or that West was acting after “consultation or advice” by Mr. Young [Court’s order of disqualification, CT 94].

Second, West is also censured for accompanying Young to a court hearing on a matter collateral to this action [CT 19, line 19, to 20, line 20]. Appellant can see no other reason for the lengthy presentation of this incident other than to bring to the attention of the District Court an alleged maneuver by *Lyndol L. Young* and to thereafter burden *West* with guilt by association. The nature of Young’s action is not set forth in the affidavit and Smith’s connection with it is therefore impossible to determine. But even if Smith was not involved in any manner with Young’s suit, appellant does not and can not believe that this Court’s mandate means that appellant’s attorney, whoever he may be, can not be seen with Lyndol L. Young without incurring the risk of disqualification.

Third, affiant Olson takes one and one-half pages to outline activities of Mr. Young and again comes to the underscored conclusion that West and Young appeared at a committee hearing in Los Angeles [CT 21, line 28, to 23, line 12]. The same observations made above are

¹⁰The background and incident itself are detailed in *Cord*, footnote 4, *ante* p. 3, 370 F. 2d 420.

applicable here. In addition, affiant Olson admits that these committee hearings were so relevant to the present case that appellee and Olson's co-counsel attended [CT 23, lines 3-5]. Surely appellant's attorney had the same right.

2. *Association Through Correspondence.* Appellee objects to the fact that on two occasions Young apparently obtained letters sent to West by affiant Olson and responded, vehemently, to him [CT 17, lines 16-23; 20, line 22, to 21, line 27]. Olson's affidavit does not reveal whether West transmitted Olson's letters to Young or whether, which is equally possible, West told Smith and Smith told Young. In any event the continued participation of Young in the action is explained in his letter of January 20, 1966, to Olson. Young believed that his action had been consolidated with Smith's before United States District Judge Whelan and that Young had been made a party respondent to the second case then pending in the Court of Appeals [CT 71, first paragraph]. Further [CT 71, first paragraph]:

"You, therefore, should send me copies of your communications with Mr. George O. West who is Mr. Smith's attorney. I always show your client Cord the courtesy of sending him copies of my letters to you, including a copy of this letter."

Both Olson [CT 21, lines 21-27] and the District Court [CT 93, lines 21-29] quoted the following portion of Young's letter of January 20, 1966, and failed to include the explanatory clause which is emphasized [CT 72, third paragraph]:

"You are again advised that there are no possibilities of any kind of your making a settlement in

this litigation. There never has been and there never will be a settlement of this litigation without my consent, *which is necessary because of my rights as an assignee.*”

On January 20, approximately eleven months before this Court’s clarification of its mandate in the second case of *Cord v. Smith*, appellant submits that Young’s position as a party to a consolidated action, and any conduct by West based upon that assumption, was tenable. This Court noted in its second opinion that there was “sharp disagreement between the parties as to whether our mandate would prevent Young from proceeding in the case as an assignee,” and only decided the issue due to the “exceptional nature of the question presented.”¹¹ Appellant does not believe that he, or his attorney, should be penalized for acts based upon a decision which was not then in effect.

3. *Joint Appearance During Motion for Clarification.* In connection with appellee’s motion for clarification in 1966, appellee now complains, first, that Young and West appeared jointly on that motion and the points and authorities submitted therewith [CT 17-18]. Since both Smith and Young were parties to the motion, and obviously aligned on the same side, appellant submits that this joint effort was proper *before* the Court’s clarification.

Second, appellee accuses West of allowing Young to prepare two affidavits which were submitted by Smith during the motion [CT 18-19]. This fact is not supported by Mr. Olson’s affidavit. Certain “testimony” by Smith is quoted by affiant Olson to the effect that

¹¹*Id.*, 370 F. 2d at 424.

Young prepared Smith's affidavits [CT 24, lines 18-25], but these statements are quoted out of context and are also hearsay and incompetent. As urged by attorney West at the hearing on appellee's motion to disqualify, if the District Court were going to consider this alleged testimony the entire record should have been brought forward and Smith's statements considered in context. Further, even if this accusation were true, Young was a party to the motion, the statements contained in the affidavits were pertinent to most of the motions then pending before the Court, and appellant does not believe that any aid which he allegedly rendered Young in Young's Suit was in violation of this Court's mandate *at that time*. As implied by this Court in its second opinion, the posture of the case during this period was so confused that an extraordinary remedy was required, the complete dismissal of Young's suit. Appellant again submits that he should not be penalized in almost an *ex post facto* manner.

4. *Association by Proximity.* It is significant that not one of the above incidents described by affiant Olson occurred after this Court's decision in December of 1966. The District Court stated that "such assistance has been given in the past and there is no reason to believe that it will cease in the future" [CT 94, lines 8-9], without observing that the position of Young, and the concomitant duties of Smith and West, were far from clear when the conduct related by Olson took place. Appellant undoubtedly cannot argue on this appeal that appellee waived his objections to attorney West, since the rights of Smith under the mandate are involved and not the rights of West [RTD 12-13], but appellant can object to the use of supporting facts

which were generally before the Court of Appeals on its clarification of mandate and arose as a direct result of the confusion which led to that clarification. There is a compelling reason to believe that such activity, if pertinent at all, "will cease in the future": the clarification of mandate rendered by this Court.

Aside from these prior incidents the main thrust of appellee's position seems to be that since Mr. West and Mr. Young had and presumably still have offices in the same suite they will be working "in obvious close association" during the pendency of the action [CT 23-24]. The District Court relied in part upon this fact [CT 93, lines 19-20].¹²

When a partner¹³ or an associate¹⁴ of a law firm has represented a given party in the past, the remaining members of the firm, including even law clerks,¹⁵ are thereafter disqualified from taking a position which is adverse to that party on substantially the same matter. The rules are applied with extreme rigor in order to avoid both the "disintegrating erosion of particular exceptions" noted in *Cord v. Smith*¹⁶ and the suspicion of conflict which would otherwise arise.

Appellee [CT 75-77] Henry S. Drinker,¹⁷ apparently the American Bar Association [CT 79-80], and the

¹²The allegation by Olson that Young and West had a joint lease on the suite involved, although undenied, is admittedly hearsay and incompetent [CT 24, lines 7-10].

¹³*Consolidated Theatres, Inc. v. Warner Bros. Cir. Man. Corp.* (2d Cir. 1954), 216 F. 2d 920.

¹⁴*Fisher Studio, Inc. v. Loew's Inc.* (.....), 232 F. 2d 199, cert. den. 352 U.S. 836.

¹⁵*Consolidated*, footnote 13, *ante* p. 12.

¹⁶*Cord*, footnote 2, *ante* p. 2, 338 F. 2d at 525.

¹⁷*Drinker Legal Ethics* (1953 Columbia University Press, N.Y.) p. 106.

Honorable Warren J. Ferguson would extend the above principle, together with its rigid application, to those attorneys who share a common office suite. Bluntly stated, the proposition is:

“Two lawyers who share offices, although not partners, bear such close relations to one another as to bring Canon 6 into play.”¹⁸

Canon's 6 and 37 are set forth in Appendix A.

Appellant contends that such a fact, by itself, cannot be law. In general the partnership and associate rules are rigorously enforced since exceptions might ultimately destroy them and a sufficient connection between the two attorneys involved is apparent from their association: the attorneys are in fact closely associated and are expected to consult and advise one another when necessary. These facts cannot be posited when two attorneys have offices in the same suite, on the same floor, or on different floors of the same buildings. There is absolutely no *a priori* reason to assume that two attorneys will advise and consult with one another merely because each pays his share of the rent. Such close association could indeed be the case, but until that conduct were shown as a matter of fact appellant submits that the new attorney should not be disqualified. Adherence to the flat rule proposed by Mr. Drinker and the American Bar Association would create an irrebuttable presumption which is unfounded in the experience of most attorneys and would of course deprive many attorneys of clients and income without the reciprocal advantages of a partnership or association.

¹⁸A.B.A. Informal Opinion 284, as quoted CT 79.

Appellant has not discovered any cases in point.¹⁹ *Laskey Bros. v. Warner Bros. Pictures*,²⁰ at least illustrates appellant's position and the hesitancy of the courts in extending the inflexible rules discussed above. In *Laskey* attorney Isacson represented two defendants on closely related matters and later formed a partnership with attorney Malkan. Malkan and Isacson were thereafter disqualified as attorneys for plaintiff due to Isacson's earlier representation of the first defendant. Malkan later formed a partnership with Ellner and the question arose whether they were also disqualified to represent a second plaintiff, who attempted to retain the new firm, due to Isacson's prior representation of the second defendant.

The court held that the new firm was not disqualified because the presumption of access to confidential information, posited against attorneys Malkan and Ellner, had been rebutted during a hearing. Although this presumption was irrebuttable in the case of Isacson and Malkan, the court would not apply the conflict rules rigorously *ad infinitum*, but would allow a later association to prove that a conflict did not exist.²¹ Appellant submits that, analogously, even if the fact of joint office space were sufficient to raise a presumption of conflict, this presumption must be rebuttable and that appellant was entitled to a full hearing for that purpose. Appellant was denied such a hearing [RTD 10, 17-18].

¹⁹A.B.A. Formal opinion 104 and *In re Ridgely* (1954 Del.), 106 A. 2d 527 are often cited but are clearly distinguishable from the present case.

²⁰*Laskey Bros. v. Warner Bros. Pictures* (2d Cir. 1955), 224 F. 2d 824, cert. den. 350 U.S. 932.

²¹*Id.*, 224 F. 2d at 827.

II.

The District Court Erred by Not Allowing Appellant a Full Hearing on Appellee's Motion to Disqualify.

Generally a motion is the proper procedure for bringing before the court a question of disqualification.²² The court may order a hearing on a motion for disqualification either before itself or before a Special Master.²³ At the District Court hearing in the present matter attorney West requested a hearing to take evidence [RTD 10, 17-18] but the Court took the matter under submission and made its order without further proceedings. Although the question seems to be one of first impression, appellant contends that the District Court erred and abused its discretion in not permitting appellant a full hearing. Appellant has argued in this brief that the alleged facts contained in attorney Olson's affidavit were almost non-existent and that, in any event, the District Court should not have followed the rigid rules advocated by appellee concerning office-sharing attorneys. Under these circumstances, and particularly when a more liberalized rule of law is involved which by necessity calls for certain factual determinations by the Court, appellant submits that he should have had the right, for exaple, to cross-examine attorney Olson, to introduce the full transcript of appellant Smith's testimony before the Bar Association [CT 17-18], to examine Mr. Young regarding the nature of their office association. As stated by Mr. West during the District Court hearing this and other evi-

²²*International Brotherhood of Teamsters v. Hoffa* (D.D.C. 1965), 242 F. Supp. 246, 257.

²³Procedure followed in *Consolidated*, footnote 13, *ante* p. 12, *Laskey*, footnote 19, *ante* p. 14.

dence should have been taken since “basically we have involved my right to practice law” [RTD 10]. It is true that the core issue before Judge Ferguson was whether appellant Smith had the right under this Court’s mandate to retain attorney Young, but the collateral question of attorney Young’s right to practice law was and must be involved to some extent. If attorney West is to be denied his right to represent appellant, appellant requests that he at least be allowed to cross-examine the moving parties and to subsequently present an adequate record to this Court.

Conclusion.

For the reasons stated it is respectfully submitted that that part of the District Court’s order disqualifying attorney George O. West be reversed and the cause remanded to the District Court for trial or, in the alternative, a full hearing on appellee’s motion.

GEORGE O. WEST,

Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE O. WEST

APPENDIX A.

Canon 6.

Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. With the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Canon 37.

Confidences of a Client.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are

other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

No. 22,479

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALVIN J. SMITH,

Appellant,

vs.

E. I. CORD, Individually, E. I. CORD, doing business as
Los Angeles Broadcasting Company,

Appellees.

On Appeal From the United States District Court
for the Central District of California.

APPELLEE'S BRIEF

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FILED

APR 29 1968

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Appellees.

On Appeal From the United States District Court
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APPELLEE'S BRIEF.

I.

Jurisdiction.

Appellee agrees with Appellant's jurisdictional statement (A.O.B. 1, 2). However, Appellant has apparently made a typographical or printer's error in the amount of claimed damages. Claimed damages was \$3,000,000, plus \$3,000,000 exemplary damages, not Three Billion Dollars.

Appellee agrees that Appellant has the right to appeal from the order in question.

II.

Appellee's Supplemental Statement of the Case.

(The following will not repeat Appellant's statement of the case, but will merely supplement the same.)

The manner in which the question of disqualification of George O. West arose:

The mandate of the Court of Appeals was duly spread on the records of the United States District Court by Judge Ferguson on April 24, 1967 [C. T. 115]. The following day Appellee through his attorneys filed with the District Court a notice of motion to change venue and transfer the cause to the District of Nevada [C. T. 115]. This motion came on for hearing before Judge Ferguson on May 15, 1967 [C. T. 115]. On that date, George O. West appeared as attorney for plaintiff Smith and requested a continuance [C. T. 115]. It had come to the attention of Appellee Cord and his attorneys that George O. West was an office associate of the disqualified attorney Lyndol L. Young and that he and Mr. Young had signed a joint lease for office space in the Mobil Building in downtown Los Angeles, and further, that throughout the proceedings before the Court of Appeals on the motion to clarify mandate, Mr. Young had been conferring with Mr. Smith and that Mr. Young had prepared affidavits for Mr. Smith to sign. Mr. Young and Mr. West thus appeared to have been collaborating. Hence, when Mr. West requested a continuance on the motion to transfer the cause to Nevada, attorneys for Appellee Cord advised Judge Ferguson that there was a serious question whether Mr. West was also disqualified under the mandate of the Court of Appeals from representing plaintiff Smith (Appendix, p. 2).

Judge Ferguson requested Appellee Cord and his attorneys to file a motion to disqualify Mr. West (Appendix, p. 3). Such a notice of motion to require com-

pliance with mandate and motion to disqualify Mr. West was prepared, and filed July 24, 1967 [C. T. 14]. Appellee requested the court for the following orders:

1. An order requiring plaintiff Calvin J. Smith to comply with the mandate of the United States Court of Appeals in this matter, in its proceedings No. 19,416 dated November 4, 1964, reported in 338 F. 2d 516, which mandate was ordered spread in this case by the Honorable Thurmond Clarke, on April 26, 1965, and which mandate was thereafter spread a second time on the order of the Honorable Francis C. Whelan on May 5, 1965, and to comply with the mandate of the United States Court of Appeals in its No. 19,416 dated December 15, 1966, 370 F. 2d 418, and which mandate was spread by the Honorable Warren J. Ferguson in this action on April 24, 1967.

2. For an order declaring whether George O. West, Esq. the present attorney of record for plaintiff Calvin J. Smith is qualified or not to represent plaintiff Calvin J. Smith in this action.

3. An order declaring whether or not Calvin J. Smith and George O. West, Esq. or either of them, are in violation of the mandates above referred to [C. T. 14, 15].

Said notice of motion was supported by the affidavit of Milo V. Olson, dated July 18, 1967, to which were attached. 10 Exhibits [C. T. 16-73a]. It should be noted that Exhibit 9 attached to the original affidavit was marked as a letter of Lyndol L. Young to Milo V. Olson dated January 20, 1966. Also, referred to as Exhibit 9 is the *brief cover on the Yax case*; however, at the time of the hearing

before Judge Ferguson, this Exhibit number was corrected to make it Exhibit 10 [R. T. p. 4, line 16, to p. 5, line 3]. (Ex. 10 is copied in Appendix p. 4).

George O. West filed an affidavit in opposition to said motion to disqualify him, and said affidavit is 6 pages long [C. T. 91a-91o]. However, the said affidavit does not in substance deny any of the factual matters upon which his disqualification was based.

Appellant Smith also filed an affidavit in opposition to the motion to disqualify Mr. West, which affidavit is dated July 28, 1967 [C. T. 117, 118]. In substance, appellant Smith said he had read the notice of motion to require compliance with mandate and motion to disqualify Mr. West, and then stated,

“3. I have in all respects complied with the mandate of the United States Court of Appeals in this matter. 4. I want to get to trial in this matter because there is no meritorious defense to my action, and all of these motions merely delay my trial.” [C. T. 117, 118].

Thus, Appellant Smith did not produce any evidence in opposition to the facts supporting the disqualification of Mr. West, nor was there any denial of said facts by the affidavit of Appellant Smith. The statement that appellant had complied with the mandate is nothing but a legal conclusion.

Because Mr. West's affidavit (and Appellant's Brief, pp. 6, 7) had raised some question as to how the opinion of the American Bar Association had been obtained, Milo V. Olson filed a reply affidavit which sets forth all of the facts relating to his correspondence with the American Bar Association [C. T. 81-87].

In addition to the affidavits above mentioned, the court was requested to and did take judicial notice of the entire files and records of this action. This request was made by Appellee not only in the notice of motion above quoted, but also in the affidavit of Milo V. Olson [C. T. 24, lines 14-17].

On August 7, 1967, the motion to disqualify came on for hearing before the Honorable Warren J. Ferguson, and was heard at the same time as appellee by his attorneys made the motion to transfer the cause for trial to another district [R. T. of August 7, 1967, p. 4, lines 4-13]. The motion to disqualify Mr. West was first argued [R. T. 4-21].

Judge Ferguson had the following undisputed facts before him in support of his findings and order: The fact that Mr. West is an office associate of Mr. Young was undenied, and the fact that they had a joint lease at the Mobil Building was undenied [C. T. 24]. The preparation of the affidavits by Mr. Young for the signature of Appellant was undenied [C. T. 18-19]. A joint response, motions and points and authorities were filed by Appellant Smith and his attorney Mr. West in collaboration with Mr. Young, his disqualified attorney in opposition to Appellee's motion for clarification of the mandate of this Court, reported at 338 F. 2d 516 [C. T. 32-48]. There was no explanation on the part of Mr. West as to how Mr. Young obtained copies of letters Mr. Olson had sent to Mr. West [C. T. 17]. There was no denial that Mr. Young had recommended Mr. West to Appellant Smith [C. T. 24]. There was no denial by either Mr. West or Mr. Smith that Appellant Smith saw Mr. Young several times a week after Mr. West had been

retained as his attorney, and Mr. Young prohibited from assisting Appellant [C. T. 24]. There was no denial of any of the essential facts resulting in the disqualification.

Mr. West argued in substance that the hearing on the clarification of mandate before the United States Court of Appeals, reported in 370 F. 2d 418, in the case of *Cord v. Smith*, was *res judicata* [R. T. p. 9, line 23; p. 11, lines 2-9; p. 12, lines 10-13]. Mr. West also argued that reference to the testimony given by Appellant Smith before the State Bar was improper [R. T. p. 12, lines 2-10]. Mr. West further argued that there was no fiduciary relationship between him and Mr. Young, although he did not deny that he and Mr. Young were office associates [R. T. p. 17, lines 4-11].

There was a duty on the attorneys for Appellee Cord, to advise Judge Ferguson that there had been a violation of the court order, even though such information came as a result of testimony heard on a preliminary investigation being held by the State Bar (Canons of American Bar Association, No. 29). This is commented on in Reporter's Transcript, page 7, lines 6-21.

Although Appellant complains (A.O.B. 5) that the District Court erred in denying Appellant a hearing and did not give him sufficient time to prepare and present witnesses and other evidence pertinent thereto, the record shows that objection to be but a "dismal wail!"

As early as May 15, 1967, Appellant Smith and his attorney George O. West knew that a motion was going to be filed to order the disqualification of

George O. West as an attorney for Appellant Smith (Appendix, p. 3). Said motion to disqualify was served and filed on July 24, 1967, and the hearing thereon, as above stated, was held on August 7, 1967 [C. T. 115]. Appellant concedes that such a motion is proper procedure to determine disqualification of an attorney (A.O.B. p. 15). And, notwithstanding that Appellee's motion stated it was based upon the notice, the files and records of the action and the affidavits filed in support thereof [C. T. 15], the *only* evidence adduced by Appellant was the affidavits of George O. West and Calvin J. Smith above referred to [C. T. 91a-o, 117, 118].

On August 7, 1967, the matter was submitted, and at no time from August 7, 1967, until September 26, 1967, did Appellant or his attorney George O. West present any additional data in the form of evidence of any kind, by motion, affidavit, or otherwise, for the court to consider, nor was there any offer of proof made on behalf of Appellant or by George O. West as to what the other evidence, if any, would consist of, and after the order was made on September 26, 1967, disqualifying Mr. West [C. T. 92-94], no application or motion was made to reopen the matter for the purpose of adducing any additional evidence, and the next thing Calvin J. Smith and his attorney George O. West did was to file a notice of appeal [C. T. 100].

In essence, therefore, the facts upon which the order was made disqualifying George O. West as attorney for Appellant Smith stand undisputed. It is significant also that nowhere in Appellant's Brief was any statement or suggestion made as to what additional evidence there was or could be produced on behalf of Appellant.

There is complete lack of merit to Appellant's second specification of error (A.O.B. p. 5).

Thus, the appeal for all practical purposes, is based on undisputed facts, and it is a question of law whether those facts support the disqualification of George O. West as attorney for Appellant Smith in this case.

III.

Appellee's Responding Argument.

A. The Undisputed Evidence Fully Supported the Order Disqualifying George O. West as Attorney for Plaintiff Smith. (All emphasis is added.)

The statement made on page 6 of Appellant's Opening Brief that the only evidence presented to the District Court in support of the motion for disqualification was contained in the affidavit and reply affidavit of Milo V. Olson, attorney for Appellee [C. T. 16-36, 81-87], is not entirely accurate. In addition to the data contained in the affidavits and Exhibits attached thereto, the court was asked to and did take judicial notice of all the files and records of this action. Further, of course, the court took notice of the fact that the affidavits filed on behalf of Appellant, that is, Appellant Smith's affidavit [C. T. 117, 118] and the affidavit of George O. West [C. T. 91a-o] did not dispute nor deny the factual matters contained in the affidavit of Milo V. Olson [C. T. 16-73a] and as disclosed by the record of this case.

Appellee will not argue whether the court ruled that attorney West did not have the right to represent Smith or whether the court held that Smith did not have the right to retain West. The fact is, George O. West is disqualified to represent Appellant (plaintiff Smith) in this case.

The first mandate of this court reported in 338 F. 2d 516, page 526, directed the trial court to order that:

“Lyndol L. Young, Esq. shall not at any time, directly or indirectly, and whether as attorney of record or not, represent, counsel or advise plaintiff Calvin J. Smith in connection with said action.” (Said action being the case of *Smith v. Cord*, No. 64-288-WJF, in the United States District Court, Central District of California, at Los Angeles.)

Said mandate was ordered spread not only by Judge Thurmond Clarke on April 26, 1965 [C. T. 115] but was ordered spread a second time by Judge Whelan on May 5, 1965 (370 F. 2d 418, 420). On that occasion, appellant Smith was in the courtroom. Thus, there is no question that appellant knew that the court had ordered that Mr. Young was no longer, directly or indirectly, whether as attorney of record or not, to represent, counsel or advise him.

Notwithstanding this, the facts are undisputed that although Appellant purportedly retained George O. West as his attorney in the place of his disqualified attorney Young, Appellant participated in a program purporting to claim that Mr. Young, his disqualified attorney, could still participate in the case as a 50% assignee of his claim; Appellant permitted Mr. Young to accompany him and Mr. West to the deposition of Appellant, and his attorney Mr. West refused to request Mr. Young to leave so the deposition could proceed (370 F. 2d 418, 420), and then, after the clarification of mandate proceedings were filed in the United States Court of Appeals, Appellant signed affidavits prepared for him by Lyndol L. Young [see Exhibit

5 to affidavit of Milo V. Olson, C. T. 18, 19, 50-58]; and further, on September 30, 1965, Appellant Smith signed another affidavit [C. T. 60] which was obviously prepared by Mr. Young because the affidavit of service by mail shows it was even served by mail on his own attorney George O. West [C. T. 64].

George O. West, at this time, although purporting to be attorney for Appellant Smith, was permitting Mr. Young to prepare such affidavits on behalf of Appellant [C. T. 18, 19], and Mr. West joined in briefs and the other motions prepared by Mr. Young filed in the motion to clarify mandate proceedings before the Court of Appeals, wherein they requested that the Court of Appeals panel of judges be disqualified; that the matter be heard en banc; that the prior opinion be vacated, etc.; and the record shows convincingly that Appellant and Mr. West joined in such documentation and such motions [C. T. 32-48].

Respecting conferences relating to a possible settlement held with Mr. West, Mr. West permitted Mr. Young to reply to correspondence in that regard [C. T. 71, 72]. A letter written to George O. West by Mr. Cord's attorneys dated January 3, 1967 [Ex. 7 to Olson affidavit, C. T. 66, 67] was replied to by correspondence from Mr. Young in the form of a letter dated January 20, 1966 [C. T. 71, 72].

Mr. West accompanied Mr. Young before a subcommittee of the United States Senate, presided over by Senator Tydings of Maryland [C. T. 23]. It is

undisputed that Mr. West and Mr. Young occupied offices together at 315 West Ninth Street, Suite 900, Los Angeles and had the same telephone number [C. T. 23, 24], and it is undisputed that Mr. Young and Mr. West jointly signed a lease as lessees for Suite 650 at the Mobil Building, 612 South Flower Street, in Los Angeles, which lease will not expire until October of 1971 [C. T. 24]. There is no denial of these facts, nor did Appellant or Mr. West deny that Appellant Smith called on Mr. Young several times a week after Mr. West had been retained, and Appellant Smith even had testified that he had retained Mr. West at the suggestion of Mr. Young, his disqualified attorney [C. T. 24].

While Mr. West and Appellant quibble at page 9 of Appellant's Opening Brief as follows:

"Olson's affidavit does not reveal whether West transmitted Olson's letter to Young, or whether, which is equally possible, West told Smith and Smith told Young,"

it is still quite apparent that under those circumstances, Mr. West knows best how Olson's letter got to Mr. Young that was sent to Mr. West. This could easily have been settled by either Mr. West or by Appellant Smith in their affidavits, but they did not see fit to do so. In any event, if Mr. West transmitted Olson's letter to Mr. Young, that is collaboration that is prohibited under the mandate, and if Appellant conferred with Mr. Young, this likewise "flies in the teeth" of the mandates in this case.

While the foregoing is not all of the evidence, as the court was entitled to make reasonable inferences from such facts, it is quite clear that the foregoing was sufficient support for the court's finding

"that the relationship between Attorney Young and Attorney West is so close that to permit Attorney West to proceed as Smith's attorney would violate the mandates. Not only are West and Young office associates, jointly leasing office space, but Attorney Young replies to correspondence involving the lawsuit." [C. T. 93].

A further finding was made that on September 30, 1965, when West was an attorney of record for Appellant Smith, Mr. Smith signed an affidavit, where service by mail was made upon Cord's attorneys, and by such

"affidavit of service by mail, it was certified that a copy of the affidavit was also served on Mr. West. It is not known who prepared the affidavit, but the inference is clear that it was not done by Mr. West." [C. T. 93, 94].

The court concluded:

"The totality of the circumstances have led this court to the conclusion that Mr. West simply cannot represent Smith without 'assistance by consultation or advice' from Mr. Young. Such assistance has been given in the past and there is no reason to believe it will cease in the future." [C. T. 94].

The *undisputed evidence supports the foregoing finding and conclusion*, and supports the order that

“The motion of defendant to disqualify George O. West, Esq. as attorney for the plaintiff Smith is granted.” [C. T. 95].

Judge Ferguson further ordered that

“All proceedings are stayed until such time as the *plaintiff obtains counsel who will not and cannot be influenced or advised* in any degree by *Lyndol L. Young, Esq.*” [C. T. 95].

The record of this case shows that Mr. West and Appellant Smith in the past have not complied the conditions of said order nor with the mandates.

Under Rule 52(a) of the Rules of Civil Procedure, the findings just referred to should not be set aside *unless clearly erroneous*, and in view of the record in this case, said findings and conclusion are not “clearly erroneous”. As this was an order made *on a motion*, findings of fact and conclusions of law were unnecessary (under Rule 52); nevertheless, the court did in fact make findings and conclusions of law, and made an order thereon disqualifying appellant’s attorney, Mr. George O. West.

The following cases hold that unless the findings are “clearly erroneous”, the appeal court is bound by them.

Kamen & Co. v. Paul H. Aschkar & Co., 382 F. 2d 689 (Calif. 1967);

Ventura County v. Blackburn, 362 F. 2d 515 (Calif. 1966);

Beaver v. United States, 350 F. 2d 4 (Calif. 1965);
Chichester v. Golden, 321 F. 2d 250 (Calif. 1963).

The court is entitled to view not only the evidentiary facts that are undisputed, but also to draw factual inferences that reasonably may be drawn from undisputed facts.

See:

Truck Terminals, Inc. v. C.I.R., 314 F. 2d 449 (Calif. 1963);
American Pipe and Steel Corp. v. Firestone Tire and Rubber Co., 292 F. 2d 640 (Calif. 1961).

“Clearly erroneous” means that although the evidence supports the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

Admiral Towing Co. v. Woolen, 290 F. 2d 641 (Calif. 1961).

It is submitted, however, that such a firm conviction that a mistake has been committed would hardly be possible from the undisputed evidence and reasonable inferences that may be drawn therefrom in this matter.

The Court of Appeals, of course, may take judicial notice of its own record, and not only did the District Court do so but the Court of Appeals is requested to do so in this case.

See:

Thomas v. United States, 376 F. 2d 564;
Kamsler v. M.I.F. Corp., 359 F. 2d 752.

All of the foregoing establishes that there is no merit to Appellant's first specification of error (A.O.B. p. 5).

B. Two Lawyers Who Share Offices, Though Not Partners, Bear Such a Close Relation to One Another as to Bring Canon 6 (Canons of the American Bar Association) Into Play. See Bound Volume of Official Opinions of the American Bar Association, Appendix A, Decision No. 284.

The Report prepared by the Ethics-Conflicts of Interest Panel of the 1965 (California) State Bar Convention discussed "the thorny problems facing the lawyer when conflicts of interest arise between attorney and client." This Report was printed in the Los Angeles Daily Journal, Report Section, of October 26, 1965, commencing at page 11. The American Bar Association opinion (No. 284) is set forth on page 13 thereof.

This Report caused counsel for Appellee to request an opinion from the American Bar Association's Standing Committee on Professional Ethics. Said Committee of the American Bar Association reported:

"If, however, your question is rephrased to inquire whether a lawyer sharing offices with another is precluded ethically from representing a client whom the other lawyer cannot represent, then the answer appears clear. Canon 6 specifically prohibits the representation of conflicting interests. In Formal Opinion 33, this committee held that this canon would prohibit a partner from representing a client whom another member of the part-

nership could not ethically represent. In Informal Decision 284 we held:

‘Two lawyers who share offices, although not partners, bear such close relation to one another as to bring Canon 6 into play.’

“To the same effect are Formal Opinion 104, Informal Opinion 855, and Drinker, ‘Legal Ethics’, page 106.

“These opinions and decisions appear to apply directly to the situation regarding which you inquire. We, therefore, hold that regardless whether or not under the circumstances which you describe a lawyer who shares office space with another lawyer who is disqualified from representing a client is likewise disqualified from representing that client, he may not ethically do so.”

A full copy of the A.B.A. opinion so received dated July 1, 1967 is part of the record [C. T. 79-80].

In *Drinker* on Legal Ethics, page 106, it is said:

“The injunction not to represent conflicting interests applies equally to law partners—, *also to lawyers, not partners, having offices together.*”

Citing following footnote:

“A.B.A. op. # 104; App. A, 284; Mich. 100; see also N.Y. City 386 (the lawyer must be above suspicion). In N.Y. City 105, that Committee said:

“When attorneys occupy offices together, they have a mutual relation of trust and confidence—.”
Cf. N.Y. City B. 205.

Not only have Mr. West and Mr. Young worked closely together on this specific case, but in addition thereto, at least since August 10, 1966, they have shared offices together, first at 315 West Ninth Street, Suite 800, Los Angeles, California, 90015, and since January 5, 1967 (if not sooner), they have shared offices in Suite 650 at 612 South Flower Street, Los Angeles, California, 90017.

Mr. West is thus disqualified not only by his active participation and collaboration with Mr. Young, but also *because they are office associates* which Mr. West and appellant admit (A.O.B. 11, 16). Apparently they will be sharing offices for some time to come (until 1971) as they signed a lease together [C. T. 24].

The authorities that relate to the circumstances that lawyers representing conflicting interests may not form a partnership except by dropping out of both sides of the cases (American Bar Association, Opinion No. C-437) are applicable here, as well as the rule that an attorney who is with a firm that has in the past participated in litigation through which he could have gained certain information not otherwise available, should not undertake representation of another related party in subsequent litigation where such information might be material (American Bar Association Ethics Committee Opinion, C. 493).

See:

T. C. Theatres Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265;

Brown v. Miller, 286 Fed. 994;

United States v. Bishop, 90 F. 2d 65, at 66;

In re Boone, 83 Fed. 994;

Wutchumna Water Co. v. Bailey, 216 Cal. 564,
at 571;

Lasky Bros. v. Warner Bros., 130 F. Supp. 514;

Weidekind v. Tuolumne County Water Co., 74
Cal. 386.

In this case, we need go no further than the rule which is the law of this case as set forth in *Cord v. Smith*, 338 F. 2d 516, and 370 F. 2d 418.

C. The Mandate of 338 F. 2d 516, 526 Was in Effect, and There Is No Justification for the Conduct of Appellant Smith, Mr. Young and Mr. West in Defiance Thereof, Because of Proceedings That Took Place on the Clarification of Mandate Matter.

It appears to be Appellant's contention that the mandate of this court made on November 4, 1964 (338 F. 2d 516, at 526) was inoperative after it was ordered spread on April 26, 1965, and again on May 5, 1965. The Court of Appeals clearly indicated that any such contention of Appellant and Mr. West is not so when in its opinion at 370 F. 2d 418, it said, in referring to Mr. Young and Appellant (p. 424):

"And, he may not, as we indicated in our prior opinion, assist Smith or his attorney by consultation or advice."

It is precisely this that Mr. West, Appellant Smith and Mr. Young continued to do after the mandate of 338 F. 2d 516 was spread. Just because Mr. Young claimed he was a 50% assignee of Mr. Smith, that did not operate to make the final order and mandate no longer effective. That absurd argument in effect is made by Mr. West and Appellant as justification for their conduct in violating the mandate.

D. Appellant and His Attorney West Had a Duty and Obligation to Disclose to the Court at the Outset the Relationship Not Only Between Appellant and Young, but Also Between West and Young .....	19

The first time Mr. West appeared before the Court of Appeals at the oral argument on motion to clarify mandate on June 2, 1966, Mr. West should have disclosed to the Court of Appeals that although he purportedly represented Mr. Smith, he still permitted Mr. Smith to confer with Mr. Young, and that Mr. Young had in fact prepared affidavits for Mr. Smith to sign.

Further, at the first appearance Mr. West made before Judge Ferguson, Mr. West should have disclosed to the court that he and Mr. Young shared offices (Appendix pp. 1-3), instead of putting the burden on Appellee and his attorneys to bring this to the court's attention.

Canon 22 of the American Bar Association, first sentence thereof, provides: "The conduct of a lawyer before the Court, and with other lawyers, should be characterized by candor and fairness."

Particularly in view of the mandate of this Court and the orders that had been made disqualifying Appellant's former attorney Mr. Young, there was a peculiar duty on Mr. West to be fair and candid with the court. This negative action on the part of Appellant and his attorney Mr. West comes within the prohibition of the last sentence of Canon 22 of the American Bar Association which provides: "These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice."

For example, the case of *Daily v. Superior Court*, 4 Cal. App. 2d 127, at 131, states:

“ ‘Deceit may be *negative* as well as affirmative; it *may consist in suppression of that which it is one's duty to declare*, as well as in the declaration of that which is false.’ ”

Daily v. Superior Court, *supra*, also refers to the *Matter of Shay*, 160 Cal. 399, at page 406, where Mr. Justice Shaw, speaking for the court said:

“ ‘The persons here named are all persons engaged in the service of the court, assisting it in the exercise of its jurisdiction, and in the performance of its functions. They are actually, or potentially officers of the court. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons.’ ”

See also:

Vaughn v. Municipal Court, 252 A.C.A. 376, at 385.

In *Grove v. State Bar*, 63 Cal. 2d 312 at 315, the court there said:

“Petitioner contends that the failure to convey to Mr. Coleman's request for a continuance does not constitute misleading ‘the judge or any judicial officer by an artifice or false statement of fact or law.’ (Bus. & Prof. Code, §6068, subd. (d).) There is no merit to this contention. The concealment of a request for a continuance misleads the judge as effectively as a false statement that there was no request. *No distinction can*

therefore be drawn among concealment, half-truth and false statement of fact. (See Green v. State Bar, 213 Cal. 403, 405 [2 P.2d 340].)”

In view of the foregoing rules and the Canons of the American Bar Association, and the Rules of Professional Conduct that are applicable here, and the orders and mandates made in this case, it is submitted that Appellant and Mr. West have not only failed to comply with the orders of the court, but that Mr. West has not complied with the duties he owed the court as an attorney, and by the Brief that he has prepared and filed herein, he insists in effect that he and Appellant are not required to comply with the Rules of Professional Conduct, or with the mandates of this Court.

E. As Above Set Forth, Judge Ferguson Found by His Order That Appellant Had Failed to Comply With Orders of the Court, and Stated:

“The totality of the circumstances have led this court to the conclusion that Mr. West simply cannot represent Smith without ‘assistance by consultation or advice’ from Mr. Young. *Such assistance has been given in the past and there is no reason to believe that it will cease in the future.*” [C. T. 94].

One clear indication that such assistance will not cease is evidenced by Appellant’s present appeal. To permit Mr. Young’s office associate to now counsel Appellant, falls within the statement used by this Court in 370 F. 2d 418, at 424, “This is too easy a way to avoid the disqualification.”

Judge Ferguson went on to state that, “The mandates could be enforced by contempt proceedings, but

that will be small solace to Cord." [C. T. 94]. Thus, Judge Ferguson made no order of contempt, nor did he on his own motion make an order dismissing the action, notwithstanding Appellant's persistent refusal to comply with the court orders, and the court's findings thereon.

The undisputed evidence fully sustains the order appealed from.

Conclusion.

The order of disqualification of George O. West, as Appellant's attorney, and the order staying the proceedings should be affirmed.

Most respectfully submitted,

MILO V. OLSON,
WILLIAM K. WOODBURN and
EDWARD D. NEUHOFF,
By MILO V. OLSON,
Attorneys for Appellee Cord.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

MILO V. OLSON

APPENDIX.

Pages 1-3 Transcript of May 15, 1967 Hearing before Judge Ferguson.

Page 4 Exhibit 10 to Olson Affidavit—Cover of Petition in re *Clarke v. Yax*.

Los Angeles, California, Monday, May 15, 1967,
10:00 A. M.

(Other court matters.)

The Court: Mr. Murphy.

The Clerk: No. 6 on the calendar, Case No. 64-288-F, Calvin J. Smith v. E. L. Cord, et al., hearing plaintiff's motion to continue defendant's motion for change of venue and defendant's motion to change venue to District of Nevada.

Mr. Olson: Milo V. Olson, ready in this case for one of the moving parties.

Mr. West: May it please the court, George O. West for the plaintiff Smith.

The plaintiffs are moving to continue, we request that the matter be continued, if possible, for a period of at least 60 days, for the reasons set forth in my affidavit.

Although I am recovered from the injuries I suffered, I am now in the headache phase. I am not able to devote a full day, or even more than an hour or two, to my office. There are quite a few matters raised in the 22 pages that I was served with that we have to more or less set forth our case, the number of witnesses and so on. I just haven't had a chance to sit down with Mr. Smith to see who they are. So I can't be more specific, other than to say at this time that they are local witnesses.

The Court: Mr. Olson.

Mr. Olson: I will respond to the motion of Mr. West first, your Honor.

Your Honor, it might seem a little queer and odd that we didn't—

The Court: In view of the background of the case, Mr. Olson, you might need to explain a little.

Mr. Olson: Yes, your Honor.

There is a serious question—and this is embarrassing to me to bring this up because Mr. West's conduct with us has been gentlemanly, he has appeared to be making an attempt to conduct himself as a lawyer should—but there is a serious question of whether Mr. West, in representing Mr. Smith, is in violation of the mandate of this court. And I call this to your Honor's attention, so your Honor can do as your Honor sees fit in regard to the mandate at this point.

For example, Mr. West refused to agree that Mr. Young could not attend the deposition of Mr. Smith, after the Court of Appeals had ruled that Mr. Young was disqualified and could not, directly or indirectly, represent Mr. Smith. Mr. Young, Mr. West and Mr. Smith appeared together at the deposition.

In the proceedings before the Court of Appeals Mr. West permitted his client, Mr. Smith, to sign an affidavit that was specifically prepared by Mr. Young. Mr. West permitted himself to join in the points and authorities with Mr. Young.

When Mr. Young was appearing on his own behalf before the Court of Appeals, Mr. West joined Mr. Young in the motion to disqualify two members of the panel of the Court of Appeals. This was in August of 1965, I believe, or thereabouts.

Now, they are currently also associated in the Mobil Building at the corner of Sixth and Flower, Sixth Street and Flower.

Consequently, under those circumstances, as the Court of Appeals said, certainly Mr. Smith can find another lawyer, with the 25,000 lawyers there are in the

State of California, it is a coincidence that Mr. West now is Mr. Smith's attorney, under these circumstances, and is an office associate with Mr. Young.

I call that to your Honor's attention before we proceed further. That is one of the reasons we think, as far as a continuance is concerned, I think possibly there should be a continuance.

The Court: I don't think you need comment on it any further, Mr. Olson. I think the problem is serious enough that the motion for a change of venue should be continued.

And at the same time that I continue that motion the court would request that you file a motion setting forth in affidavit form the other matters concerning whether or not Mr. West can continue to represent Mr. Smith, so the court can hear both matters at the same time.

Mr. Olson: Very well.

The Court: This will take, I am sure will be most strongly opposed.

Now the 60 days will be during the time when we will be in our Judicial Conference of the Ninth Circuit, so I will continue the motion on change of venue to August 7th, and then at that time if you so desire, Mr. Olson, if you will set the matter for hearing on the same date.

Mr. Olson: Very well, your Honor.

The Court: Notice waived?

Mr. Olson: Notice waived.

The Court: Very well.

Mr. Olson: Thank you, your Honor.

(Other court matters.)

IN THE
Supreme Court of the United States

October Term, 1966
No. 936

HONORABLE THURMOND CLARKE, Chief Judge, United
States District Court, Central District of California,
Petitioner,

vs.

WILLIAM G. YAX,

Respondent.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.

LYNDOL L. YOUNG,
612 South Flower Street,
Los Angeles, Calif. 90017,
Counsel for Petitioner.

Ex. #10

No. 22480 ✓

In the
United States Court of Appeal
For the Ninth Circuit

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN;
JUDA GLASNER and OSHER ZILBERSTEIN
doing business as the UNITED ORTHODOX
RABBINATE of GREATER LOS ANGELES,
UNITED ORTHODOX RABBINATE of
GREATER LOS ANGELES, A. M. BAUMAN
and JACOB ADLER,

Appellees.

FILED

APR 10 1968

WM. B. LUCK, CLERK

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In the
United States Court of Appeal
For the Ninth Circuit

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN;
JUDA GLASNER and OSHER ZILBERSTEIN
doing business as the UNITED ORTHODOX
RABBINATE of GREATER LOS ANGELES,
UNITED ORTHODOX RABBINATE of
GREATER LOS ANGELES, A. M. BAUMAN
and JACOB ADLER,

Appellees.

No. 22480

PRELIMINARY STATEMENT

This is an appeal by the plaintiff [Tr. p. 119] from a judgment of dismissal [Tr. pp. 106-112] holding that plaintiff's amended complaint did not state a claim upon which relief could be granted [Tr. p. 109] and that defendants were entitled to summary judgment because there was no triable issue of fact [Tr. p. 112].

The question of the sufficiency of plaintiff's complaint was heard by this Court in appeal No. 19872 (*Erlich v. Glasner*) and reversed on the grounds that the trial court failed to state the reasons for its dismissal (*Erlich v. Glasner*, 9th Cir. 1965, 352 F. 2d 119).

The question of the sufficiency of plaintiff's amended complaint was before this court in appeal No. 20982 (*Erlich v. Glasner*) and reversed on the grounds that the District Court failed to comply with the provisions of Rule 12 (b) in that affidavits submitted by defendants in support of their motion to dismiss for failure to state a claim required this court to treat this motion as one for summary judgment under Rule 56 (*Erlich v. Glasner*, 9th Cir. 1967, 374 F. 2d 681).

This matter is now before this court for a third time.

STATEMENT AS TO JURISDICTION

This is an action under the Civil Rights Act (42 U.S.C.A. 1983, et seq.). Jurisdiction lies in the Federal Court pursuant to 28 U.S.C.A. 1343 [Tr. p. 2]. The judgment of October 30, 1967 [Tr. pp. 116-118] is a final decision, reviewable in this court (28 U.S.C.A. 1291).

STATEMENT AS TO FACTS

The facts are all contained in the amended complaint [Tr. pp. 2-6] and are the same as recited in the opinion of *Erlich v. Glasner*, 9th Cir., 1965, 352 F. 2d 119, 120-121 and *Erlich v. Glasner*, 9th Cir., 1967, 374 F. 2d 681.

David Erlich is engaged in the process of slaughtering and processing kosher poultry, which he distributes wholesale and retail to the Jewish populace in Los Angeles and neighboring counties. For 13 years he op-

erated as an individual under the fictitious name of West Coast Poultry Company [Complaint, Par. II, Tr. p. 3]. In August of 1960 he formed a corporation known as the West Coast Poultry Company which continued the same business at the same address. Plaintiff and his wife own all of the outstanding shares of stock in this corporation and the appellant is the president and general manager thereof. [Complaint, Par. III, Tr. p. 3].

The defendant Juda Glasner is a civil service employee employed by the Department of Health of the State of California as Kosher Food Law Representative charged with the enforcement of California Penal Code §383b. [Complaint, Par. V, Tr. p. 3]. He and the defendants Chaim I. Etner and Osher Zilberstein are also engaged in business under the fictitious name of United Orthodox Rabbinate of Greater Los Angeles [Complaint, Par. IV, Tr. p. 3]. Defendants Juda Glasner, Chaim Etner and Osher Zilberstein as alleged orthodox Rabbis contend that they, and only they, are empowered and have full and complete authority to dictate what is and what is not kosher. [Complaint, Par. VI, Tr. p. 3]. Thus they have created themselves as the sole heirarchy to supervise kashruth. To enforce their dictatorship and compel the kosher poultry dealers of Southern California to retain their rabbinical services, the defendants use the police enforcement position of defendant Glasner, California Kosher Food Law Representative, and with threats of criminal prosecution

coerce the poultry dealers of Southern California to retain their rabbinical services [Complaint, Par. VII, Tr. p. 4].

To compel the plaintiff in this cause to retain the rabbinical services of the United Orthodox Rabbinate of Greater Los Angeles, the defendant Juda Glasner in his capacity as Kosher Food Law Representative but not within his duties as kosher food law representative, filed two criminal complaints against the plaintiff, falsely accusing him of violating California Penal Code §383b [Complaint, Par. VIII (b); Tr. p. 4].

In the second criminal complaint in which the defendant Glasner was the complaining witness, Sam Salter and John Reyna, former employees of the plaintiff were offered payment to falsely testify under oath that the plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements [Complaint, Par. VIII (d); Tr. p. 4].

When prosecution of the plaintiff under California Penal Code §383b was unsuccessful, the defendants pursuant to their conspiracy to compel plaintiff to retain the rabbinical services of the defendant, United Orthodox Rabbinate of Greater Los Angeles, again with Glasner as the complaining witness, but not within his duties as kosher food law representative, filed a series of criminal complaints against Sidney Abramovitz, David Glickman, Bezliel Orlanski and Neptali Friedman, employees of the plaintiff, falsely charging

them with violating California Penal Code §383b, so that they left the employ of the plaintiff [Complaint, Par. VIII (d) to (h); Tr. pp. 4-5].

Still in pursuance of their policy of coercion, the defendants communicated with the customers of the plaintiff and warned them that if they purchased kosher poultry from the plaintiff they would be charged by the defendant Glasner with a violation of California Penal Code §383(b) [Complaint, Par. VIII(a); Tr. p. 4], and to show that they meant business, the defendants in conformance with their conspiracy, entered into a champertous agreement with competitors of the plaintiff, who commenced an action in the Superior Court of the State of California, being L.A. Superior Court action No. 825,740 for an injunction to restrain plaintiff from selling poultry unless it was done under the supervision of these defendants [Complaint, Par. VIII (i); Tr. p. 5]. Furthermore, by means of advertising, these defendants cautioned the public of Southern California not to purchase any of plaintiff's kosher products [Complaint, Par. VIII (b), Tr. p. 4].

An amended complaint was filed in which it was alleged in paragraphs VII and VIII that the conduct of the defendant Glasner was: "not within the course of his duties as Kosher Food Law representative." [Tr. p. 4]. Plaintiff further amended his complaint by adding to paragraph IX, allegations that the interference by the defendants with the business of the West Coast Poultry Company was a direct interference with plain-

tiff's right to peacefully operate his business and earn a livelihood for himself and his family; all in violation of the privileges and immunities guaranteed to him as a citizen of the United States by Section 1 of Amendment XIV of the Constitution of the United States.

Plaintiff in his amended complaint also added paragraph X requesting punitive damages [Tr. p. 6].

Following the spreading of the second mandate, the appellees Judah Glasner and Chaim I. Etner filed answers to the amended complaint [Tr. pp. 18-22]. The remaining defendants, through their attorney Phil Silver, served plaintiff's counsel with a copy of an answer but never filed it.

On July 14, 1967 defendant Judah Glasner filed his motion to dismiss the amended complaint and the action on the grounds that the amended complaint failed to state a claim against this defendant [Tr. pp. 23-24].

On August 11, 1967 defendant Judah Glasner filed an amended notice of motion seeking judgment on the pleadings, summary judgment in the alternative or both [Tr. p. 32].

On August 25, 1967 the remaining defendants with the exception of Chaim I. Etner, filed their notice of motion to dismiss the complaint [sic] and for entry of summary judgment [Tr. p. 50].

As to Chaim I. Etner, a settlement was concluded between him and the plaintiff and he is no longer a party to the action.

On October 10, 1967 the court granted the motions to dismiss and for summary judgment and directed that its opinion constitute the findings [Tr. pp. 106-112] (*Erlich v. Glasner*, 274 Fed. Supp. 11). On October 30, 1967 judgment of dismissal was entered in favor of the defendants [Tr. pp. 116-117] and this appeal thereupon followed [Tr. p. 119].

CONTENTIONS AND ISSUES

The primary issue, of course, is the right of plaintiff David Erlich to maintain his present law suit for violation of his civil rights. No adjudication on the merits has been had and the trial court has denied him an opportunity to go to trial on the grounds that:

1. The West Coast Poultry Company, a California corporation is the victim, and not the plaintiff, and a corporation cannot maintain an action under the Civil Rights Act.

2. What defendant Judah Glasner did as Kosher Food Law Inspector of the State of California was discretionary acts within the scope of his duties and therefore he was immune from prosecution under the Civil Rights Act.

Plaintiff David Erlich contends:

1. That the activities of the defendants injured the plaintiff, not the corporation.

2. That except for judges, legislators and prosecutors, state officials are *not* immune from being sued for violation of the Civil Rights Act.

3. That regardless, the overt acts of the defendants alleged in Paragraph VIII of the complaint [Tr. pp. 4-5] were not discretionary acts within the course of the duties of the Kosher Food Law Inspector.

The issues presented on this appeal are:

1. Did David Erlich in his amended complaint set forth sufficient injuries to himself so that he is a proper plaintiff in this law suit for violation of his civil rights.

2. Is the Kosher Food Law Inspector of the State of California immune from suit under the Civil Rights Act for discretionary acts done in the course of his duties.

3. Are the overt acts charged in the amended complaint discretionary activities performed by defendant Glasner in the course of his duties.

SPECIFICATION OF ERRORS

The trial court erred in the following respects:

1. Holding that any injury which occurred because of violation of the Civil Rights Act was done to West Coast Poultry Company, a California corporation, and not to plaintiff as an individual [Tr. pp. 108-109].

2. Holding that immunity to a State Officer for discretionary acts was an absolute defense in the federal court for violation of the Civil Rights Act [Tr. pp. 109-111].

3. Holding that the activities of the defendant Glasner fell within the letter of his discretionary duties thus clothing him with immunity under the circumstances of this case [Tr. p. 111].

4. Holding that plaintiff expects this court and a jury to determine what is Kosher and what is treife [Tr. pp. 111-112].

5. Holding that there is no triable issue of fact in this cause [Tr. pp. 109-112].

ARGUMENT

POINT I

REGARDING THE QUESTION OF IMMUNITY

In holding that defendant Judah Glasner as a state officer was not subject to an action for violation of the Civil Rights Act for his discretionary acts within the scope of his authority this trial court relied on *Hoffman v. Halden*, 9th Cir., 1959, 268 Fed. 2d 280 [Tr. p. 110; *Erlich v. Glasner*, 274 Fed. Supp. 11, pp. 13-14].

Unquestionably, that was the decision of this Court in *Hoffman v. Halden* when it was decided in 1959. However, subsequently the Supreme Court in 1961 decided *Monroe v. Pape* (*Monroe v. Pape*, 1961, 365 U.S. 167; 81 S. Ct. 473; 5 L. Ed. 2d 492) which held that

public officials (judges, prosecutors and legislators excepted) have no immunity under state law in an action brought under the Civil Rights Act.

When the same question presented itself again to this Court in 1962 (*Cohen v. Norris*, 9th Cir., 1962, 300 Fed. 2d 24) this Court on the basis of *Monroe v. Pape* rejected the same defense of state immunity and overruled its former holding in *Hoffman v. Halden*. In discussing immunity this Court in *Cohen v. Norris* stated on p. 33:

“*Monroe v. Pape* involved police officers and, while the opinion of the court does not specifically discuss immunity, the result reached necessarily implies rejection of such a defense as a general proposition. As appellees concede, they would not be immune from liability had an action been brought against them in the courts of California for false arrest and imprisonment. See *Miller v. Glass*, 44 Cal. 2d 359, 282 P. 2d 501. But in any event, no local rule of immunity unassociated with a generally recognized common-law immunity can stand as a defense in a Civil Rights Acts case.”

In *Nelson v. Knorr* (6th Cir. 1958), 256 F. 2d 312, 314 it was stated:

“We hold at the outset that the extent of the defendant’s insulation from liability under the Civil Rights Act cannot properly be determined by reference to the local rule in Michigan. Surely each state cannot be left to decide for itself which of its

officials are completely immune from liability for depriving a citizen of rights granted by the federal constitution. The question must be decided as a matter of general law.”

In at least one instance the defense of immunity from prosecution heretofore available to Judges, Prosecutors and Legislators (*Agnew v. Moody* (9th Cir., 1964), 330 F. 2d 868), was held not applicable as a defense when the offender acts in some capacity other than in the position which grants him the immunity. Such a situation presented itself in *Robichaud v. Ronan* (9th Cir. 1965), 351 F. 2d 533, where the plaintiff brought an action under the Civil Rights Act against the county attorney and the deputy county attorney from Maricopa County, Arizona. The defendants pleaded that they were immune from liability for acts committed in the performance of their official duties, and the trial court dismissed the complaint. In reversing, the appellate court stated on page 536:

“We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and Laws? (citations.) To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.”

and the Court further stated on pages 537-538:

“The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process.”

In further support of its ruling that immunity precluded the present action, the trial court referred to *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 and applied it to the present cause as follows [Tr. p. 111; *Erlich v. Glasner*, 274 F. Supp. 11, 14]:

“In that case police officers were acting under an unconstitutional law and the court held that, if they were acting in good faith, no liability ensued. Here, we are dealing with a state representative acting within his discretionary duties and whether or not in so acting he is clothed with immunity from liability under the Civil Rights Act. To hold that the Kosher Food Law Representative or anyone in a similar position is required to establish his good faith in a court after his activity was within his discretionary duties would lead to endless harassment and ultimate frustration in carrying out his duties. It is, therefore, concluded that defendant Glasner’s activity falls within the letter of his discretionary duties and that he is clothed with immunity under the circumstances of this case.”

It is respectfully submitted that the trial court's conception of *Pierson v. Ray* is not correct for *Pierson v. Ray* only held that good faith and probable cause which is available as a defense to a public official in a state court action is also available as a defense in an action under Sec. 1983 of the Civil Rights Act. As Mr. Chief Justice Warren stated (386 U.S. 557; 87 S. Ct. p. 1219):

“We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Sec. 1983. This holding does not, however, mean that the complaint should be dismissed.”

This holding is merely that good faith and probable cause is a defense; to be pleaded and proved by defendants as any other defense. That this seems to be the correct interpretation is indicated by the decision of this Court in *Notaras v. Ramon*, 9th Cir., 1967, 383 Fed. 2d 403, 404 holding that good faith was an issue in that cause having been tendered as a defense in the pre-trial order.

That *Pierson v. Ray* means that good faith and probable cause is an affirmative defense is the conclusion also reached by Judge Hauk in *Herbert v. Morley*, U.S. D. C. Central Div. Calif., 1967, 273 Fed. Supp. 800 where it is stated on p. 805:

“While affirming the doctrine of *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) *supra*, that police officers are subject to suit under Sec. 1983, the Court specifically held that ‘the defense of good faith and probable cause * * * available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Sec. 1983.’ 386 U.S. 547, 557, 87 S. Ct. 1213, 1219, 18 L. Ed. 2d 288, 296 (1967).”

In support of its position that immunity shielded defendant Judah Glasner, an employee of the State of California for his discretionary acts within the scope of his authority, the Trial Court in its opinion (which is also the findings) refers to *S. & S. Logging Co. v. Barker*, 9th Cir., 1966, 366 Fed. 2d 617 which while not determining the application of immunity in Civil Rights cases did refer to *Norton v. McShane*, 5th Cir., 1964, 332 Fed. 2d 855 [Tr. p. 110; *Erlich v. Glasner*, 274 Fed. Supp. p. 14].

S. & S. Logging Co. was, of course, not a Civil Rights case. It was an action for violation of the anti-trust laws brought under Sec. 4 and Sections 1 and 2 of the Sherman Act (159 Sec. A. 1, 2) of the Clayton Act (15 U.S.C.A. 15) against employees of the Federal Government.

Norton v. McShane was an action brought by plaintiffs against officials of the United States Department of Justice to recover damages for alleged deprivation

of their rights under the Civil Rights Act. In affirming a judgment for defendants, however, the appellate court was careful to point out that Sec. 1983 is applicable only to deprivation of rights when defendant is acting under color of *state* law, not federal law (*Norton v. McShane*, Supra on p. 862).

If in the present cause defendant Judah Glasner was charged with acting under color of federal law, *Norton v. McShane* could be applicable.

The trial court also relied on *Glickman v. Glasner*, 230 C.A. 2d, 120, 40 Cal. Rptr. 719 [Tr. p. 109, *Erlich v. Glasner*, 274 F. Supp. 11, p. 13] that Glasner's activity was within his discretionary duties and therefore he was immune from tort liability. However, *Monroe v. Pape*, 1961, 365 U.S. 167 (81 S. Ct. 473, 5 L. Ed. 2d 492) and *Cohen v. Norris* (9th Cir., 1962) 300 Fed. 2d, 24, 33 have now definitely established that state immunity from tort liability is not available as a defense in an action brought under the Civil Rights Act.

In *Sava v. Fuller*, 1967, 249 C.A. 2d 281; 57 Cal. Rptr. 312, it is stated on p. 288:

“The case of *Glickman v. Glasner*, *supra*, is troublesome. No specific immunity appears to have been involved. The court based its holding upon the fact that the public employee was engaged in the exercise of a discretionary function. On the other hand, section 820.2 [Government Code] was not mentioned. The court did not consider whether the libel ‘*resulted from*’ the exercise of a discre-

tionary function. Neither did it consider any of the many cases which have construed the Federal Tort Claims Liability Act. (28 U.S.C.A., Sec. 2680, Subd. (a).)''

In passing it should be noted that the office of Kosher Food Law Inspector was not created by the Legislature of the State of California, but by the State Personnel Board at the request of the Department of Public Health to carry out the provisions of Calif. Health and Safety Code, Sec. 214. Under Sec. 214 the Calif. Department of Public Health has the responsibility for enforcement of Section 383b of the Penal Code. (*Glasner v. Department of Public Health*, 1967, 253 A.C.A. 813; 61 Cal. Rptr. 415.) In other words, Glasner was only a police officer with limited duties.

POINT II

REGARDING THE DISCRETIONARY ACTS OF THE DEFENDANT GLASNER.

In concluding that the defendant Glasner was immune from prosecution under the Civil Rights Act, the Trial Court referred to his discretionary activities within the scope of his authority.

As the Trial Court stated:

“It is, therefore, concluded that defendant Glasner’s activity falls within the letter of discretionary duties and that he is clothed with immunity under the circumstances of this case.” [Tr. p. 111; *Erlich v. Glasner*, 274 Fed. Supp. on p. 14.]

It is respectfully submitted that this statement by the Trial Court is in error. While the duties of Kosher Food Law Inspector may have allowed him to exercise discretion [Fn., Tr. pp. 110, 111; *Erlich v. Glasner*, 274 Fed. Supp. on p. 13], the actual conduct of the defendant Judah Glasner as Kosher Food Law Inspector as alleged in the amended complaint were definitely not within his discretionary duties in that respect. For example, the mere fact that as Kosher Food Law Inspector, defendant Glasner was authorized to enforce violations of Penal Code, Section 383b (California Health and Safety Code, Section 214) did not authorize him to employ tainted testimony to secure a conviction. (Complaint, Paragraph VII g; [Tr. p. 5].)

If the West Coast Poultry Company, a California corporation, violated Penal Code, Section 383b, presumably under his duties as the Kosher Food Law Inspector the defendant Glasner had the authority to issue a complaint against the corporation charging such violation; but, he did not have the discretion to determine to by-pass the corporate offender and charge Erlich, an individual, as the culprit. (Paragraph VIII c) [Tr. p. 4].

Presumably the defendant Glasner as the Kosher Food Law Inspector may have had discretion to proceed against the West Coast Poultry Company, a corporation, and Erlich, an individual, for violating Penal Code, Section 383b, but it certainly wasn't within the scope of his duties to deliberately hound and harass the employees of the corporation and of plaintiff so

that they would leave the employ of the corporation and the plaintiff (Paragraph VII, d through f [Tr. pp. 4, 5].)

Presumably the defendant Glasner as the Kosher Food Law Inspector had discretion to report violations of the kosher food law committed by plaintiff to his superiors in the California Department of Public Health, or even to prosecuting officials; but it was not a discretionary activity on his part to enter into champertous agreements with competitors of Erlich to commence injunction proceedings to restrain Erlich from selling kosher poultry unless he retained the rabbinical services of the defendants. (Paragraph VIII i, [Tr. p. 5; and affidavit of Samuel Goss, Tr. pp. 88-90].)

Without unduly burdening this Court, it is respectfully submitted that there is sufficient evidence available that what the defendant Glasner did under color of State law, was not activity within the letter of his discretionary duties.

POINT III

REGARDING THE QUESTION OF ORTHODOX JUDAISM.

The Trial Court is under the impression that it would be called upon to decide as a matter of fact:

“Who is and who is not an orthodox Rabbi, what is and what is not kosher poultry, and whether plaintiffs Schoietim were treife.” (Tr. p. 112; *Erlich v. Glasner*, 274 Fed. Supp. on. p. 14.)

Plaintiff differs. Orthodoxy and kosher are not issues in the cause, and their appearance therein was interjected by defendants, not by the plaintiff. The defendant, Judah Glasner, commences his affidavit in support of a motion for summary judgment as follows [Tr. p. 45]:

“That I am and at all times mentioned in plaintiffs Amended Complaint have been an ordained Orthodox Rabbi in good standing and accredited to function in all spheres of Rabbinate, . . .”

Since this is not a true statement, plaintiff immediately furnished the Court with facts to impeach Glasner.

The question is, not Orthodoxy, but what Glasner did in his capacity as Kosher Food Law Inspector; and under those circumstances it is immaterial whether he was an Orthodox Rabbi as required by the State of California, or not. However, if for some reason the defendant feels that it is important that Glasner establish his status as an Orthodox Rabbi, obviously plaintiff should be permitted to produce evidence that in his synagogues he permits mixed seating [Tr. pp. 67-72]; and that mixed seating is heretical (*Katz v. Singerman*, La. 1960, 120 So. 2d 670; *Fisher v. Congregation B’nai Yitzhok*, Pa. 1955, 177 Pa. Super. 359, 110 A. 2d 881; *Davis v. Scher*, Mich. 1959, 356 Mich. 291, 97 N.W. 2d 137 [Tr. p. 94]). That at least would aid the trier of fact, whether Court or Jury, to determine what weight to give to the testimony of defendant Glasner.

The question then is not one of Rabbinical Orthodoxy or kosher poultry, or whether plaintiff's Schoicim were treife, but the activities of defendant Glasner in his capacity as Kosher Food Law Inspector of the State of California. Of course, should the defendant Glasner not raise the question of his rabbinical Orthodoxy upon the trial of the action, obviously it could not be an issue for determination by the trier of fact.

POINT IV

REGARDING THE DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT.

In entering judgment for the defendants the trial court stated:

"The plaintiff in the original action was the corporation, West Coast Poultry Company, which complaint was dismissed because a corporation is not a person within the meaning of the Civil Rights Act. In the amended complaint of the present action which was then filed, David Erlich, the stockholder, is the plaintiff." (Tr. p. 107; *Erlich v. Glasner*, 274 F. Supp. on p. 12.)

The statement is not correct. West Coast Poultry Co., the corporation was never a party to this action. David Erlich was always the plaintiff in this cause. He filed the original complaint and the amended complaint. (*Erlich v. Glasner*, 1967, 374 Fed. 2d 681, 682.)

West Coast Poultry, the corporation, was the plaintiff in another action (No. 64-931 CC) which was dismissed under the doctrine of *Hague v. C.I.O.* (1939), 307 U.S. 496, [59 S. Ct. 954, 83 L. Ed. 1423] that a corporation may not maintain an action under the Civil Rights Act. Erlich was not a party to that action and of course is not bound by that judgment.

Erlich brings the present action because of injuries done to him personally. That he personally was the victim of defendants' acts is evidenced by the following:

a. Since Erlich is the dominant shareholder in the corporation, an attack upon the corporation is a direct injury to plaintiff's property consisting of his ownership of shares in the corporation.

b. Under the privileges and immunities section of Section 1, Article XIV of the United States Constitution, Erlich is guaranteed this right to pursue a lawful occupation and earn a living for himself and his family without interference by defendants.

c. That several of the overt acts alleged in paragraph VIII of the amended complaint, are directed against the plaintiff personally, and not against the corporation [Tr. p. 4-5].

A.

**Regarding the Injury to the Plaintiff as a Shareholder
of West Coast Poultry Company, a California Cor-
poration.**

While it is true that Section 1983 permits relief only to natural persons because only natural persons and not artificial persons are citizens of the United States entitled to the privileges and immunities under Section 1 of the XIV Amendment (*Hague v. C.I.O.* (1939), 307 U.S. 496, 514, 59 S. Ct. 954, 83 L. Ed. 1423), nevertheless “a corporation is a ‘person’ within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. . . .” (*Louis K. Liggett Co. v. Baldridge* (1928), 278 U.S. 105, 111 [49 S. Ct. 57, 58, 73 L. Ed. 204]).

A person’s business, whether corporate or individual is also a property right (*Louis K. Liggett Co. v. Baldridge, supra.*)

In California shares of stock are personal property (*Kirkland v. Levin* (1923), 63 Cal. App. 589, 590 [219 Pac. 455]), and although the owner of shares is not the owner of the corporate assets, he has a right to share in the corporate earnings and assets after dissolution (*Rhode Island Hospital Trust Co. v. Doughton* (1925), 270 U.S. 69, 81 [46 S. Ct. 256, 258] 70 L. Ed. 475). Since the value of shares is determined by the corporation’s assets and earnings, any impairment of the corporation’s property or its earning power re-

duces the value of the stock and proportionally diminishes the value of the shareholders property (*Burke v. Badlam* (1881), 57 Cal. 594, 601).

Plaintiff and his wife own all of the outstanding shares of stock in West Coast Poultry Company [Amended Complaint, par. III, Tr. p. 3]. The conduct of the defendants as alleged in the amended complaint was in violation of the privileges and immunities of the plaintiff to own property as guaranteed to him by Section 1, Article XIV, of the United States Constitution.

Moreover, a cause of action may exist in favor of both the corporation and the stockholder.

In *Sutter v. General Petroleum Corp.* (1946), 28 Cal. 2d 525, 170 P. 2d 898, plaintiff commenced an action for fraud. The plaintiff contended that by fraudulent representations and promises he was induced to participate in the organization and financing of a corporation. The trial court dismissed the cause of action on the grounds that the injuries complained of were done to the corporation and not the plaintiff as a shareholder and that since the cause of action was not derivative or representative in which the shareholders would sue in behalf of the corporation, no cause of action was stated.

In reversing the Supreme Court of the State of California said as follows on page 530:

“Generally a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. (citations.) But ‘If the injury is one to the plaintiff as a stockholder and to him individually and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action. . . . The action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.’ (citations.) And a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong. (Citations.)”

And again on page 531:

“In that fashion the defect in the island and the failure to perform the promises injured the Development Company and Rincon Company but there was also a direct individual injury to plaintiff Sut-

ter, and, as we have seen, the dual nature of the injury does not necessarily preclude an action by the stockholders as an individual. Defendants, by their promises and representations induced plaintiff to form the corporation and invest his money therein, and then breached their duty of honest dealing with him. By way of damages plaintiff Sutter asserts that because of the false representations he invested \$33,440 in the venture and the Rincon Company, and that as the result of the fraud of defendants the stock in the Rincon Company became valueless.

“While ordinarily a stockholder may not sue individually for impairment of a corporation’s assets rendering the stock worthless, yet here that result is merely one method of ascertaining the amount of damages suffered by Sutter. He lost his investment which was represented by the stock, and its reduction in value would be the extent of his loss. The damages all flowed from the tort of the defendants.”

B.

The Interference by the Defendants With the Plaintiff's Right to Earn a Living for Himself and His Family Is a Violation of Plaintiff's Rights Under the Fourteenth Amendment.

The right to earn a living is a property right guaranteed to the plaintiff under the due process clause of the Fifth Amendment to the Federal Constitution (*De Mille v. American Federation of Radio Artists* (1947), 31 Cal. 2d 139, 153 [187 P. 2d 769]; *Van Zandt v. McKee* (5th Cir., 1953), 202 Fed. Rep. 2d 490, 491) and also under the due process clause of the Fourteenth Amendment to the Federal Constitution (*Truax v. Corrigan* (1921), 257 U.S. 312, 327 [42 S. Ct. 124, 127; 66 L. Ed. 54]; *Wallace v. Ford* [D. C. Texas, 1937], 21 F. Supp. 624, 628).

Truax v. Corrigan, *supra*, involved the question of a right to picket. The court stated on page 327:

“Plaintiff's business is a property right (citation), and free access for employees, owner, and customers to his place of business is incident to such right. Intentional injury caused to either or both by a conspiracy is a tort. Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful.”

It is undisputed that the defendants and each of them are interfering with the plaintiff's right to earn a living by attempting to compel him to join and operate his business only pursuant to their rabbinical organi-

zation. It is also undisputed that the defendant Glasner, the Kosher Food Law Representative, is using his official position as an employee of the State of California, under color of law, to coerce plaintiff to join. Unquestionably the defendants were operating under color of law. There is no difference between the facts stated in *Monroe v. Pape* (1961), 365 U.S. 167 [81 S. Ct. 473, 5 L. Ed. 2d 492] where police officers of the City of Chicago broke into the petitioners' home in the early morning, got them out of bed, made them stand naked in the living room, opening drawers, ripping mattress covers, and then taking them to the police station and detaining them on open charges for about 10 hours with the facts in the present cause that the defendant Glasner pursuant to the conspiracy filed unmeritorious complaints, charging the plaintiff with the violation of California Penal Code §383b; and in the second complaint attempted to compensate two former employees of the plaintiff to testify falsely as to alleged transgression. If there is a difference, it can only be one of degree.

In selling his product to the public as kosher, Erlich is only required to exercise his judgment in good faith that the product is in fact kosher (*Hygrade Provision Co. v. Sherman* (1925), 266 U.S. 497 [45 S. Ct. 141] 69 L. Ed. 402; *Erlich v. Municipal Court* (1961), 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334).

The defendants should not be permitted to compel plaintiff to do more. Their persistence in so doing is a

direct violation of the Hobbs Act (18 U.S.C.A. 1951) the essential elements of which are interference with commerce and extortion (*Stirone v. United States* (1960), 361 U.S. 212, 218 [80 S. Ct. 270, 274; 4 L. Ed. 2d 252]). It is also in violation of plaintiff's guaranteed civil rights (18 U.S.C.A. 241).

In *Carbo v. United States* (9th Cir., 1963), 314 F. 2d 718, 732, it is stated:

“Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion ‘in any way or degree.’ ”

In *Robinson v. Lull* (U.S.D.C. Ill. 1956), 145 Fed. Supp. 134, 138, the Court quoted from *Doremus v. Hennessy* (1898), 176 Ill. 608, 614, 52 N.E. 924, 925, 54 N.E. 524, 43 L.R.A. 797 as follows:

“‘No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require.’ ”

It is also basic that plaintiff's right to work is included in the concept of liberty within the meaning of the 14th amendment of the Federal Constitution; and when that right is violated the courts will not hesitate to intervene and undo the mischief (*Parker v. Lester* [9th Cir. 1955], 227 F. 2d 708, 713-714).

Dent v. State of West Virginia (1889), 129 U.S. 114 [9 S. Ct. 231], 32 L. Ed. 623, involved the validity of a state statute requiring that a practitioner of medicine obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the School of Medicine to which he belongs; or that he has practiced medicine in the state continuously for the period of 10 years prior to March 8, 1881. In discussing the rights of individuals to pursue their vocation, it was stated by Mr. Justice Field on page 121:

“It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republic institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the ‘estate’ acquired in them—that is, the right to continue their prosecution,—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than the real or personal property can be thus taken.”

Traux v. Raich (1915), 239 U.S. 33 [36 S. Ct. 7, 60 L. Ed. 131], involved the question whether the State of Arizona could limit the employment of aliens. Mr.

Justice Hughes in delivering the opinion of the Court stated in regard to the question of the right to work on page 38:

“The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law.”

and again on page 41:

“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was a purpose of the Amendment [Fourteenth Amendment] to secure. (Citations.) If this could be refused solely on the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.”

In *Meyer v. State of Nebraska* (1923), 262 U.S. 390, [43 S. Ct. 625, 67 L. Ed. 1042], the appellant was convicted under an information which charged him with unlawfully teaching the subject of reading in the German language to a child under 10 years of age who had not attained and successfully passed the 8th grade. In reversing and discussing the rights and freedom under the Fourteenth Amendment:

“No state . . . shall deprive any person of life, liberty or property without due process of law”.

Mr. Justice McReynolds in the opinion for the court stated on page 399:

“While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire a useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (citations).”

Terrace v. Thompson (1923), 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255, although affirming the alien property laws then in existence, also stated that the Fourteenth Amendment protected an alien of Japanese descent in his right to earn a livelihood by following the ordinary occupations of life, relying upon *Truax v. Raich* and *Meyer v. State of Nebraska*.

And in *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377, it was again iterated that the right to hold specific private employment and follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concept of the Fifth Amendment.

The allegations of unlawful conduct on the part of the defendants is a direct interference with plaintiff's right to earn a livelihood for himself and his family as guaranteed to him by the privileges and immunities portion of the Fourteenth Amendment. The fact that this is done to a corporation owned and controlled by him and through which he earns his livelihood, rather than to him directly, is of no matter. Language to that effect appears in *Royal News Company v. Schultz* (U.S.D.C., Michigan, 1964), 230 F. Supp. 641, 643 where plaintiff sought an injunction under the Civil Rights Act. (Injunction modified, *Royal News v. Schultz*, (6th Cir., 1965), 350 F. 2d 302).

“Since the effect of such seizures and criminal prosecutions would be to deprive the plaintiff of business and its employees and agents of livelihood in contravention of their constitutionally protected rights, the court indicated during that hearing that it was inclined to issue an injunction to prevent the abuse of these rights.”

C.

Regarding the Allegations in the Amended Complaint.

Moreover, it should not be overlooked that the amended complaint contains many allegations of overt acts of injuries done directly to the plaintiff, rather than through his corporation. For example, paragraph VIII of the amended complaint alleges that the defendants communicated with the customers of the plaintiff [Amended Complaint, Par. VIII(a), Tr. p. 4], and

Paragraph VIII(c) [Tr. p. 4] alleges that the criminal complaints were filed against the plaintiff and not against the corporation (*Erllich v. Municipal Court* (1961), 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334). If the corporation was the culprit, why prosecute Erllich. In California corporations are responsible for their own crimes. (Calif. Penal Code, Sec. 7.)

POINT V

REGARDING THE SUMMARY JUDGMENT.

In considering the question whether summary judgment for the defendants was properly granted in this cause, defendants would respectfully call this court's attention to the language of District Judge Lynne in *Azalea Meats, Inc. v. Muscat*, 5th Cir., 1967, 386 Fed. 2d 5, where he states on pp. 9-10:

“The cases are legion which warn against the use of the summary judgment procedure provided by Rule 56 of the Federal Rules of Civil Procedure to unravel a tangled skein of facts. In *National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F. 2d 647, 651 (5th Cir. 1962) we stated:

‘Summary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is * * *. It is no part of the duty of the Court to decide factual issues, but only to determine whether there are factual issues to be tried * * *.

* * * 'summary judgment should not be granted if there is the "slightest doubt" as to the facts; * * * The fact that it may be surmised that the party against whom the motion is made is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him.' "

and further on p. 10:

"In the landmark case of *Alabama Great Southern RR. Co. v. Louisville and Nashville RR.*, 224 F. 2d 1, 50 A.L.R. 2d 1302 (5th Cir. 1955), Judge Hutcheson, as the organ of the court, wrote: ' * * * where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, an examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment.' "

In *Doff v. Brunswick Corp.*, 9th Cir. 1967, 372 F. 2d 801, 805, it is stated:

"But on a motion for summary judgment it is the moving party who carries the burden of proof; he must show that no genuine issue of material fact exists and this is true even though at the trial his opponent would have the burden of proving the facts alleged. (citations.)"

Regarding affidavits, this court reiterated the well established requirement in *DePinto v. Provident Security Life Insurance Co.*, 9th Cir. 1967, 374 F. 2d 50, 55 as follows:

“Rule 56(e) requires that evidentiary affidavits filed in connection with motions for summary judgment be made ‘on personal knowledge.’ Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in such an affidavit. (Citations.)”

A.

As to the Defendant Glasner.

Referring now to the affidavit of Judah Glasner in support of the motion for summary judgment (Tr. pp. 45-49), it is filled with opinions and generalities. No evidentiary facts are set forth and he doesn't even contend that what he sets forth is within his personal knowledge (Rule 56(e)).

He adopts the affidavit of his co-defendant Osher Zieberstein and contends that it is true and correct in so far as it relates to his conduct and assumes and believes it to be true in so far as it relates to his conduct and his office (Tr. p. 46).

He exculpates his participation in the injunction proceedings commenced by Pines Poultry and others against plaintiff West Coast Poultry without stating any facts and (Tr. p. 48) which is directly opposite to the affidavit of Samuel Goss which sets forth in detail his active participation in instituting this law suit (Tr. pp. 88-90).

Defendant, Glasner, places the responsibility of criminal prosecution on the City Attorney or District Attorney (Tr. p. 48) without any attempt to explain why plaintiff presumably was singled out as the defendant rather than West Coast Poultry, the corporation, despite the fact that he was convinced from his investigation that West Coast Poultry was in violation of the Kosher Food Law (Tr. p. 49). Nor does his attempt to state the facts that he investigated that led him to that conclusion.

Regardless, plaintiff Erlich submitted an affidavit setting forth facts accompanied by exhibits which flatly contradict Defendant Glasner's general statements (Tr. pp. 62-92).

It is respectfully submitted that nowhere in his affidavit has the defendant Glasner established as a matter of law that he did not actively participate in the overt acts set forth in Paragraph VIII of the amended complaint [Tr. pp. 4-5]. His blanket denials and protestations of innocence are insufficient, particularly in view of the affidavit of Erlich and the exhibits annexed thereto [Tr. pp. 52-92]. Perhaps a jury will accept his explanations—perhaps not. But in any event, there are sufficient disputed facts present that require a decision by a trier of fact.

B.

**As to Defendants Orlanski, Friedman & Zilberstein,
Etc.**

It would seem that if these defendants were sufficiently interested in their motions for summary judgment, they would submit some type of a factual affidavit in support thereof. These defendants have submitted no supporting papers in support of their motion nor have they submitted proposed findings of fact and conclusions of law stating the material facts in which they contend there is no genuine issue (Local Rule 3 (g) 1.).

Instead, they rely upon an affidavit of Osher Zilberstein filed 18 months before. They don't even bother to annex the affidavit to their motion but merely rely on it since it is in the file.

There is nothing to indicate in the courts opinion, which is the findings, that the court relied upon this affidavit in granting the motion for summary judgment. As a matter of fact the findings seem to be quite clear that the court predicated its decision on only two factors, and nothing else:

a. That the injured person was the West Coast Poultry Co., a corporation, and not the plaintiff.

b. That the acts complained of by the plaintiff were discretionary acts and that therefore defendant Glasner as a State employee had immunity from prosecution under the Civil Rights Act.

Nothing in the opinion makes any finding as to any other defendant. However, since the court did grant their motion for summary judgment, their position should be discussed.

The defendants Orlanski, Friedman and Zilberstein argue that since they are Rabbis in an ecclesiastical body, they are therefore acting in a judicial capacity and thus exempt from actions taken against them in their official capacity. Incredible as this argument may seem, nevertheless that is precisely what these defendants urge to the Court [Tr. pp. 8-9].

Without making a "federal case" as to the rights of these defendants to hold court, pass judgment, and issue decrees, suffice it to state that what constitutes the judiciary in the State of California is fully set forth in Article VI, Sec. 1 of the Constitution of the State of California, which does not include ecclesiastical bodies.

Barr v. Matteo, 360 U.S. 564, 569 [79 S. Ct. 1335, 3 L. Ed. 2d 1434];

Agnew v. Moody, 330 F. 2d 868, 869 (9th Cir., 1964);

Oppenheimer v. Stillwell. 132 F. Supp. 761 (U.S.D.C., S.D., Cal., 1955).

Yet these defendants seriously contend it is no violation of plaintiff's civil rights for them to convene as a Court, summon Abramovitz an employee of plaintiff to appear before it to explain his conduct and with pow-

ers of amercement penalize him and plaintiff [Tr. pp. 12-13]. The sole authority these defendants give themselves for this amazing power is that “under Hebrew law, all orthodox Jews are bound to accept the proscription or what is known as an *issur* (ban) of an ecclesiastical body of *Rabbis*” [Tr. p. 10]. It is respectfully submitted to this Court that not only is this not true, but under no circumstances could any ecclesiastical body ever enforce its dictates upon anybody (First and Fourteenth Amendments of Federal Constitution).

The question of the validity of an *issur* appeared in the case of *People v. Gordon* (Special Sessions, Kings County, 1939), 172 Misc. 543; 14 N.Y. S. 2d 333, where the trial court found the defendant guilty of falsely representing products to be kosher in violation of New York Penal Code §435a on the grounds that an *issur* promulgated by the Rabbinical Board of Greater New York

“... became incorporated by reference into the statute and is to be given effect as a valid and binding legislative enactment.”

On appeal, the Appellate Division of the Supreme Court, *People v. Gordon* (1940), 258 App. Div. 421; 16 N.Y. S. 2d 833, reversed the judgment on the law, dismissed the information, remitted the fine and exonerated the bail on the ground that the so-called rabbinate was *not* a tribunal clothed with power to act and decree, stating on page 423:

“Assuming that the decisions of ecclesiastical judiciatories as to their own jurisdiction are binding upon the parties and the courts, (*Connitt v. R.P.D.C. of N. Prospect*, 54 N.Y. 551) the People failed to establish that the rabbinate was a tribunal clothed with power to act and to decree that a fowl not slaughtered according to the regulations specified in the ‘issur’ and not bearing a token as above described, is not kosher, and, therefore forbidden to be consumed by Jews.”

The decision of the Appellate Division in *People v. Gordon* was affirmed without opinion by the Court of Appeals (*People v. Gordon* (1940), 283 N. Y. 705; 28 N.E. 2d 717).

RECAPITULATION

The trial court in granting the motion for summary judgment concluded that there was no triable issue of fact [Tr. p. 112; *Erllich v. Glasner*, 274 F. Supp. on p. 14] on the basis:

1. That the injured party was not the plaintiff but West Coast Poultry, a corporation, and

2. The immunity of Glasner because of being a State Officer [Tr. p. 109; *Erllich v. Glasner*, 274 F. Supp. on p. 13].

The trial court apparently did not rely upon any affidavits and disregarded plaintiff's statements of Genuine Issues of Fact [Tr. pp. 97-98] except as to Glasner's orthodoxy.

It is respectfully submitted that plaintiff in his individual capacity has a good cause of action for damages under the Civil Rights Act; that genuine issues of fact exist; and that defendants have not demonstrated as a matter of law their freedom from liability.

CONCLUSION

For all of the foregoing reasons the judgment should be reversed.

Respectfully submitted,

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Appendix

APPENDIX

California Constitution, Article 6, §1:

Judicial power; courts

“Section 1. The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts, municipal courts and justice courts.”

California Corporations Code, § 18:

Person defined.

“ ‘Persons’ includes a corporation as well as a natural person.”

New York Penal Code, §435 a, McKinney’s Consolidated Laws of New York, Book 39, part 1, Article 40, Penal Code §435 a.:

“A person who, with intent to defraud, sells or exposes for sale, any meat or meat preparation, article of food or food product, and falsely represents the same to be kosher, whether such meat or meat preparation, article of food or food product be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements, either by direct statement orally or in writing which might be calculated to deceive or lead a reasonable man to believe that a representation that such food is kosher or prepared

in accordance with the orthodox Hebrew religious requirements or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed the word 'kosher' in any language, or sells or exposes for sale in the same place of business both kosher and non kosher meat or preparation, either raw or prepared for human consumption, who fails to indicate on his window sign and all display advertising in block letters at least 4 inches in height 'kosher and non kosher meats sold here' or who exposes for sale in any show window or place of business both kosher and non kosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat' or 'non kosher meat' as the case may be, or who displays on his window, door or in his place of business, or in hand bills, or in other printed matter distributed in or outside of his place of business, words or letters in Hebraic character, other than the word 'kosher' or any sign, emblem, insignia, symbol or word in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, sign, emblems, insignias, symbols or marks the words 'we sell non kosher meat and food only' or 'we sell both kosher and non kosher meat and food' as the case may be is guilty of a misdemeanor.

Possession of non kosher meat and food, in any place of business advertising the sale of kosher

meats and food only, is presumptive evidence that the person in possession exposes the same for sale, with intent to defraud in violation of the provisions of this section.”

California Penal Code, Sec. 7

Words and phrases

“Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word ‘person’ includes a corporation as well as a natural person; . . . ”

California Penal Code §383b. (Note, Penal Code §383 referred to on page 17 should be section 383b.)

“§383. Kosher meats and meat preparations; sale and labeling regulations; false representations; punishment; kosher defined.

Every person who with intent to defraud, sells or exposes for sale any meat or meat preparations, and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and from a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product, or the contents of any package or container, to be so constituted and prepared, by having or permitting to be inscribed thereon the word ‘kosher’ in any language; or sells or exposes for sale in the

same place both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs in all display advertising in block letters at least four inches in height 'kosher and nonkosher meats sold here'; or who exposes for sale in any show window or place of business as both kosher and nonkosher meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height, reading 'kosher meat' or 'nonkosher meat' as the case may be; or sells or exposes for sale in any restaurant or any other place where food products are sold for consumption on the premises, any article of food or food preparations and falsely represents the same to be kosher, or as having been prepared in accordance with the orthodox Hebrew religious requirements; or sells or exposes for sale in such restaurant, or such other place, both kosher and nonkosher food or food preparations for consumption on the premises, not prepared in accordance with the Jewish ritual, or not sanctioned by the Hebrew orthodox religious requirements, and who fails to display on his window signs in all display advertising, in block letters at least four inches in height 'kosher and nonkosher food served here' is guilty of a misdemeanor and upon conviction thereof be punishable by a fine of not less than fifty dollars, nor more than three hundred dollars, or imprisonment

in the county jail of not less than thirty days, nor more than ninety days, or both such fine and imprisonment.

The word 'kosher' is here defined to mean a strict compliance with every Jewish law and custom pertaining and relating to the killing of the animal or fowl from which the meat is taken or extracted, the dressing, treatment and preparation thereof for human consumption, and the manufacture, production, treatment and preparation of such other food or foods in connection wherewith Jewish laws and customs obtain and to the use of tools, implements, vessels, utensils, dishes and containers that are used in connection with the killing of such animals and fowls and the dressing, preparation, production, manufacture and treatment of such meats and other products, foods and food stuffs. (Added Stats. 1931, c. 1029, p. 2147 §1.)”

United States Code Annotated, Title 15 § 1

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or con-

tainer of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Title 15, §2.

Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Title 15, § 15.

Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

United States Code Annotated, Title 18, §241:

Conspiracy against rights of citizens

“If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise and enjoyment of any right or privilege

secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .

“They shall be fined . . .”

United States Code Annotated, Title 18, § 1951:

Interference with commerce by threats or violence

“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, . . .

(2) The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term ‘commerce’ means . . . all commerce between any point in a State . . . and any point outside thereof; or commerce between points within the same State through any place outside such State; and all commerce over which the United States has jurisdiction.”

United States Code Annotated, Title 28, §1343:

“Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

United States Code Annotated, Title 28, §1343(1):

To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

United States Code Annotated, Title 28, §1343(2):

To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

United States Code Annotated, Title 28, §1343(3):

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

United States Code Annotated, Title 28, §1343(4):

To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.”

United States Code Annotated, Title 42, §1983:

“Civil action for deprivation of rights.

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

United States Code Annotated, Title 42, § 1985 (3) :

“Conspiracy to Interfere with civil rights

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.”

United States Constitution, Fifth Amendment:

“No person shall . . ., nor be deprived of life, liberty or property, without due process of law; . . .”

United States Constitution, Fourteenth Amendment, § 1.

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH W. FAIRFIELD,
ETHELYN F. BLACK,
ALFRED O. OMANSKY.

No. 22,80

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID ERICH,

Appellant,

vs.

JUDA GLASNER, *et al.*,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE, JUDA GLASNER.

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No. 22480
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, *et al.*,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE, JUDA GLASNER.

Introductory.

Plaintiff, David Erlich, instituted this action August 14, 1964 [Tr. p. 126] as an individual against several defendants, including appellee, Juda Glasner.

The instant brief is solely on behalf of appellee Glasner.

Appellees' respective motions for summary judgment of dismissal having been granted for reasons fully set forth in the trial court's opinion [Tr. pp. 106-112] and judgment thereon having been entered October 30, 1967 [Tr. pp. 116-118], plaintiff appealed from said judgment by notice filed November 7, 1967. [Tr. p. 119.]

Two prior judgments of dismissal were reversed, the first (*Erlich v. Glasner*, 9 Cir., 1965, 352 F.2d 119) on the basis of failure to specify the reason or reasons

therefor and with the suggestion that amendment might be sought of appellant's complaint; and the second (*Erllich v. Glasner*, 9 Cir., 1967, 374 F.2d 681) on the basis that, as an affidavit had been filed by appellee Zilberstein, the granting of a motion for dismissal was erroneous since the trial court had not expressly excluded the affidavit and hence the matter should have been disposed of as a motion for summary judgment.

The instant proceedings were had and disposed of as motions for summary judgment.

Following remand on the first appeal, appellant filed an amended complaint which constitutes his present pleading. [Tr. pp. 2-7.] Said pleading is not verified. [Tr. p. 7.]

Jurisdiction as Claimed by Appellant in the District Court.

Appellant's pleading is entitled "Amended Complaint For Violation of Civil Rights (42 USCA 1983)". By paragraph I thereof, appellant alleged [Tr. p. 2] that the District Court "has jurisdiction of this cause pursuant to 28 USCA 1343(3) which provides for actions to redress the deprivation, under power of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States; and pursuant to 28 U.S.C.A. Sec. 1331 which provides for actions arising under the Constitution of the United States", followed by allegation that the amount in controversy exceeds \$10,000.00 By paragraph IX of his amended pleading, appellant alleged [Tr. p. 6] that defendants' interference with the business of West Coast Poultry Company [a corporation—Tr. p. 3 "III"] is a direct interference with plaintiff's right to operate his business and earn

a livelihood for himself and family and that defendants' acts "deprived plaintiff of his privileges and immunities, guaranteed to him as a citizen of the United States by Section 1 of Amendment 14 of the Constitution of the United States;" and proximately caused damage and injuries to "his right and ability to earn a livelihood [sic] for himself and family, all to plaintiff's damage in the sum of \$250,000.00."

The foregoing statutes and constitutional provision are those which appellant alleged as a basis for the jurisdiction of the District Court in this cause.

Statement of the Case.

Appellant is the sole plaintiff and his action was brought and is sought to be maintained by him solely as an individual.

Appellant evidently claims that he had been deprived of his *privileges and immunities* as a citizen of the United States guaranteed to him as such under the Constitution, Amendment 14, section 1. [Tr. p. 6, "IX", as heretofore stated.]

Appellant's claimed jurisdictional basis is as above noted. The remaining allegations of his amended pleading are as follows:

From November, 1947, to August, 1960, appellant was engaged in the business of slaughtering and dispensing poultry, kosher and non kosher, at a certain address in Santa Monica, California, under the fictitious firm name of West Coast Poultry Company. [Tr. p. 3, "II".]

In August, 1960, West Coast Poultry was organized as a California corporation. Appellant and his wife own

all the stock of said corporation. Appellant is president and general manager of the corporation. It is a continuation of the poultry business of plaintiff at the same address. [Tr. p. 3, "III".]

Defendants Glasner, Etner and Zilberstein are "doing business" under the fictitious name of United Orthodox Rabbinate of Greater Los Angeles. [Tr. p. 3, "IV".]

Defendant Glasner is employed by the Department of Public Health of the State of California as the kosher food law representative and his duties consist of investigation of violations of the kosher food laws of the State of California pursuant to §383b of the California Penal Code. [Tr. p. 3, "V".]

Defendants contend that they are Orthodox Rabbis and that only they should have control to "dictate" what is and what is not kosher. Defendants' "purposes" "is to prevent plaintiff and other kosher poultry dealers from using the services of any other rabbi except themselves" and to compel plaintiff and others to retain only defendants' services. [Tr. p. 3, "VI".]

To compel kosher poultry dealers in Los Angeles County to retain defendants' rabbinical services, defendant Glasner, "acting in his capacity as kosher food law inspector of the State of California, but not within the course of his duties as kosher food law representative", has caused issuance of criminal complaints charging violations of California Penal Code, §383b, to those dealers who do not use defendants' rabbinical services. [Tr. p. 4, "VII".]

On or about April 1, 1964, defendant Glasner, "while acting in his official capacity as kosher food law representative of the State of California, but not within

his duties as kosher food law representative," and all defendants, acting under color of law, entered into an "unlawful" combination and conspiracy for the purpose of depriving plaintiff of his privileges and immunities guaranteed every "citizen" of the United States by the Constitution, Amendment 14, section 1, and in pursuance thereof, have committed the following acts: (a) Communicated with customers of "plaintiff and West Coast Poultry Company, a California corporation," and advised them that if they purchased kosher products from plaintiff or said corporation citations would be issued against them by defendant Glasner for violating Penal Code §383b. (b) Circulated advertisements in newspapers advising the public not to purchase plaintiff's kosher products. (c) Filed two criminal complaints against plaintiff, "falsely accusing him of violating §383b of the Penal Code." (d) Filed criminal complaints against employees of plaintiff and West Coast Poultry Company, a corporation, "falsely charging them with violating" California laws to coerce these employees to leave said employment. (e) Charged one Abramovitz, who was employed as "schoichet" and West Coast Poultry Company in the Los Angeles Municipal Court with aiding and abetting poultry dealers with violating Penal Code §383b and in the Beverly Hills Municipal Court with violating Penal Code §240 and Health & Safety Code §26518.5, with the result that said Abramovitz left the employ of plaintiff rather than be a "constant defendant in criminal actions." (f) Filed a criminal complaint against one Glickman, "a schoichet employed by plaintiff and West Coast Poultry Company," charging him in the Los Angeles Municipal Court with aiding and abetting unidentified kosher butchers to violate Penal Code §383b and as a result

Glickman left said employ (g) Offered payment to Salter and Reyna, "former employees of the plaintiff," to appear as witnesses against plaintiff and falsely testify that he is not slaughtering chickens pursuant to orthodox Hebrew religion requirements. (h) Defendants Orlanski and Friedman were former employees of plaintiff; defendant Glasner caused to be issued in the Los Angeles Municipal Court a criminal complaint charging them with aiding and abetting kosher poultry dealers with violating California Penal Code §383b; "the remaining defendants" advised the defendants Orlanski and Friedman that if they would cooperate with them against plaintiff the criminal complaint would be dismissed. (i) Entered into a champertous agreement with three competitors of "plaintiff and West Coast Poultry Company" to commence an action against West Coast Poultry Company for an injunction to prevent that corporation from selling kosher poultry unless they retained defendants' rabbinical services; such action was commenced in the Los Angeles Superior Court, being action No. 825,740 said three competitors have no interest in said action and commenced it at defendants' request; said action is sponsored and financed by defendants. [Tr. pp. 4-6, "VIII".]

The interference by defendants "with the business of the West Coast Poultry Company is a direct interference with the right of the plaintiff to peacefully operate his business and earn a livelihood [sic] for himself and his family" and the defendants' acts "under color of law as hereinabove set out deprived the plaintiff of his privileges and immunities, guaranteed to him as a citizen of the United States by Section 1 of Amendment 14 of the Constitution of the United States," and as a proximate result of the "overt acts hereinabove

set forth, plaintiff has sustained damages and injuries to his business and right and ability to earn a livelihood [sic] for himself and his family, all to plaintiff's damage in the sum of \$250,000.00." [Tr. pp. 5-6, "IX".]

The conduct of defendants was "opprobrious, wilful and malicious" and plaintiff requests punitive damages of \$100,000.00. [Tr. p. 6, "X".]

These constitute the allegations of plaintiff's unverified amended complaint.

Notice of motion for dismissal of amended complaint and for entry of summary judgment was filed August 25, 1967, by appellees Orlanski, Friedman, Zilberstein, Bauman, Adler, and The United Orthodox Rabbinate of Greater Los Angeles. [Tr. pp. 50-51.] Among other things, the notice referred to the previously filed affidavit of Zilberstein. [Tr. pp. 8-17.] Appellee Glasner's notice of motion to dismiss [Tr. pp. 23-25] was subsequently amended, by document filed August 11, 1967, to a notice of motion for judgment on the pleadings or in the alternative for summary judgment or both. [Tr. pp. 32-34.] The affidavit of Quimby [Tr. pp. 35-37] and the affidavit of Glasner [Tr. pp. 45-49] were presented in support. Reference also was made to the Zilberstein affidavit. On September 1, 1967, appellant filed his affidavit in opposition to the motions for summary judgment [Tr. pp. 52-62], annexing thereto some 13 exhibits—including copy of declarations of Abramowitz and Orlanski dated August 8, 1963, which were presented in a California Superior Court suit, uncertified transcription of testimony in 1961, uncertified transcription of a hearing had by a deputy district attorney, etc. [Tr. pp. 63-92.]

Following hearing, argument and consideration of the various matters presented, the trial court rendered its opinion. [Tr. pp. 106-112; *Erlich v. Glasner*, 274 F. Supp. 11.] The opinion of the trial court concludes with:

“Accordingly, the court grants defendants’ motions for summary judgment having concluded that there is no triable issue of fact. Since this opinion sets forth the basis for the court’s ruling, no findings of fact and conclusions of law shall be required. Counsel for defendants are directed to prepare a form of judgment pursuant to Rule 7 of the Local Rules of this court.”

Judgment accordingly was had and entered from which plaintiff appealed as aforesaid.

The trial court’s ruling was predicated on two separate bases: (1) the lack of appellant individual’s standing to sue for alleged interference with the corporation’s business; and (2) immunity of appellee Glasner, California State Kosher Food Law Representative, in regard to appellant’s claim. These will be discussed in the foregoing order.

ARGUMENT OF THE CASE.

I.

Lack of Appellant Individual's Standing to Sue for Alleged Interference With Corporation's Business.

In paragraphs II and III of his amended pleading, appellant alleges that from November, 1947, until August, 1960, he was engaged in the business of slaughtering and dispensing poultry, kosher and non-kosher, at a certain address in Santa Monica, California, under the fictitious firm name of West Coast Poultry Company; that in August, 1960, West Coast Poultry Company was organized as a California corporation; that appellant is president and general manager of said corporation; and that the corporation is a continuation of said poultry business. [Tr. p. 3, "II" and "III".]

It appears that since August of 1960 the business involved has been and is that of the corporation, West Coast Poultry Company. It also appears that the alleged acts are asserted to have taken place on or about April 1, 1964 [Tr. p. 4, line 10], at a time when the corporation was thus conducting the business.

It is true that appellant alleged that he is one of the two stockholders of the corporate stock and that he is the president and general manager of the corporation. However, this does not make the business activities or customers or other business affairs those of appellant as an individual. These are and belong to the corporation which is the concern carrying on the business as alleged in appellant's pleading.

Appellant, as an individual, is the sole party plaintiff. It is evident that he seeks to ignore the corporate

entity. That may not be done by him, either as stockholder or president or general manager. Appellant has no right, as an individual, to sue for redress of that which is the corporation's concern. These are the corporation's affairs, not appellant's.

"The fact that a stockholder owns all, or practically all, or a majority of the stock, does not of itself authorize him to sue as an individual." (13 *Flecher Cyc. Corp.*, 1961 ed., p. 366, §5910; *Green v. Victor Talking Machine Co.*, 2 Cir., 1928, 24 F.2d 378, 380.) As observed in the anti-trust suit in *Skouras Theatres Corp. v. Rado-Keith-Orpheum Corp.*, D.C., S.D.N.Y., 1961, 193 F.Supp. 401, 407:

"... In legal contemplation, the motion picture theatres injured by the alleged conspiracy were under control of the three sublessee corporations, and only those corporations were entitled to redress of the wrongs inflicted. The fact that plaintiffs were the landlords of the theatres avails them naught. [Citations.] Nor is plaintiffs' ownership of the sublessee corporations of any aid, for even a shareholder who owns the corporation cannot sue in its stead. [Citations.] Nor are plaintiffs' direct dealings with the defendants and their management of the business of the sublessees sufficient to confer upon them standing. 'Shareholders and officers of corporations as well as creditors and landlords have been held not to have standing to sue for treble damages.' [Citations.] The fact that plaintiffs have more than one of the above statures does not lead to the conclusion that they have standing to sue. Plaintiffs created corporations to hold the theatres under subleases in

order to obtain the benefits of such an arrangement. They may not now successfully pierce the veils of the corporate sublessees to avoid the burdens of the arrangement.”

As expressed in *Southern Carolina Council of Milk Producers, Inc. v. Newton*, D.C., A.D.S.C., 1965, 241 F.Supp. 259, 263, the rule is “an effective bar to suits by shareholders, officers, employees, and creditors, for personal losses caused by injury to the corporation. The cause of action accrues only to the corporation for which it can bring suit, or by a shareholder’s derivative suit.” To allege that the acts of a defendant or defendants have caused impairment or even destruction of the corporation’s business or assets, thereby rendering the stockholders’ property less valuable or valueless or a creditor less secure or without security or an employee with lessened or no employment, does not invest any of these persons with a right to sue for the same. (*Ibid.*, and cases cited; see also, *Gagnon v. Nevada Desert Inn*, 1955, 45 Cal.2d 448, 289 P.2d 466; *Toboni v. Pennington Millinery Co.*, 1959, 172 Cal. App.2d 47, 341 P.2d 845; *Cromelin v. Fulcher*, 5 Cir., 1951, 192 F.2d 40; *Bricton v. Woodrough*, 8 Cir., 1947, 164 F.2d 107, cert.den. 334 U.S. 849, 68 S.Ct. 1500, 92 L.ed. 1772.) In *Fleischer v. Paramount Pictures Corporation*, 2 Cir., 1964, 329 F.2d 424, cert.den. 379 U.S. 835, 85 S.Ct. 68, 13 L.ed.2d 43, it succinctly was stated to be “clear that Fleischer may not secure a personal recovery for an alleged wrong done to his corporation.”

Appellant argues that, while only natural persons are entitled to “privileges and immunities” under section 1 of the 14th Amendment (which is the basis of his

suit), nevertheless a corporation is a "person" within the meaning of due process and equal protection clauses of that Amendment (neither of which clauses is here involved); that a "person's" business whether corporate or individual is a property right; that shares of stock are personal property the ownership of which entitles one to earnings and assets after dissolution; and "since the value of shares is determined by the corporation's assets and earnings, any impairment of the corporation's property or its earning power reduces the value of the stock and proportionately diminishes the value of the shareholders' property"—the very arguments which have been made and rejected in the rationale of the foregoing decisions. Appellant's argument that he, as an individual, has the right to maintain a suit for diminution of the corporation's assets or earnings—since he and his wife (who is not a party hereto) own all outstanding shares of the corporation—is directly contrary to the established law of which the foregoing decisions are representative.

The very allegations of appellant's amended complaint demonstrates that he seeks recovery of damages for claimed injury to the business of the corporation. He may not do so as an individual.¹

¹Not made a basis of the trial court's decision but nevertheless of interest is the fact that, as alleged in the amended pleading, the corporation is a California corporation. Section 834, California Corporations Code, regulating the ringing of suits for redress of wrong committed against a corporation, is not merely procedural but is held to apply to an action brought in the federal courts. (*Koster v. Warren*, 9 Cir., 1961, 297 F.2d 418, 419, citing *Cohen v. Beneficial Industrial Loan Corporation*, 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.ed. 1528; see also *Hausman v. Buckley*, 2 Cir., 1962, 299 F.2d 696, 700 et seq.) The courts hold that the corporation's "rights, not those of the nominal plaintiff, are to be adjudicated, and the court has no jurisdiction to adjudicate its rights in its absence as a party." (*Beyerbach v.*

Appellant's suit is not a derivative suit on behalf of the corporation although the damages claimed are for interference with the corporation's business. His suit is in his own name as an individual. He cites *Sutter v. General Petroleum Corp.*, 1946, 28 Cal.2d 525, 170 P.2d 898, for the proposition that "a cause of action may exist in favor of both the corporation and the stockholder." In *Toboni, supra*, 172 Cal.App.2d at 51, 341 P.2d at p. 348, it pertinently was said:

"Plaintiff mistakenly relies upon *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525 [170 P.2d 898, 167 A.L.R. 271]. It does not support her thesis. There the plaintiff sued for damages directly and individually sustained by him, caused by the fraud of the defendant which induced plaintiff to organize and invest in a corporation to take over an oil and gas lease and abandon his own petroleum development projects. The stock in the new corporation thus formed became valueless because of that fraud. The Supreme Court carefully distinguished that case from the case of a stockholder's derivative suit, saying in part:

" 'Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other stockholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or

Juno Oil Co., 1954, 42 Cal.2d 11, 28, 265 P.2d 1, 11; *Keller v. Schulte*, 1957, 47 Cal.2d 801, 803, 306 P.2d 430, 432.) Appellant has not complied with section 834 of the California Corporations Code.

derivative action on behalf of the corporation. [Citations.] . . . ‘. . . The action is derivative, i.e., the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.’” (28 Cal.2d 530.)” (Omitting emphasis of Court.)

In his brief, appellant Erlich argues that defendants are “interfering with the plaintiff’s right to earn a living by attempting to compel him to operate his business” in a certain manner. He states that the “right to earn a living” is a property right guaranteed under the due process clause of both the Fifth and Fourteenth Amendments to the Federal Constitution, although nowhere in his pleadings (or otherwise) did he invoke said due process clauses. In essence, appellant at great length argues that *his* business and *his* right to earn from that business are somehow involved because he and his wife are stockholders of the corporate stock and he is the president and general manager of said corporation. *Nowhere, however, does it appear that appellant himself is engaged in business.* It expressly and affirmatively is alleged by appellant’s very own pleading that *the corporation* was formed in 1960 and is a continuation of the business formerly conducted by appellant. It is the corporation’s business—not any business of appellant—that is being conducted by the corporation. If there be any “interference” with that business or with the stockholder’s right to earn a “livelihood” therefrom, it is an interference with the corporation’s affairs, not with appellant’s individual

rights. Appellant confuses that the fact that there is a corporate entity and makes assertions that alleged interference with the corporation constitutes interference with him as an individual. He, as an individual, cannot ignore the corporate entity or the fact that it is the corporation (not appellant) which is conducting the business.

Of course, the *owner* of a business has a property right therein with the right to make profit (livelihood) therefrom. But *appellant* is not the *owner*; it is the *corporation*, West Coast Poultry Company, that is the *owner* of and conducting said business; and appellant's status, whether as a stockholder or president or general manager of that corporation, does not give appellant any right as an individual to seek redress for any alleged wrong done to the corporation's business.

For example, *Royal News Company v. Schultz*, U.S.-D.C., Mich., 1964, 230 F.Supp. 641, relied on by appellant as supportive of his right as an individual, was an action for injunction brought *by the corporation* whose products (books) unlawfully had been seized, thus depriving the corporation of its property without due process of law. The suit was by the corporation, not by any stockholder or officer or employee and the decision nowhere purports to invest any of these latter individuals with any right to seek redress as individuals for that which had been done to the corporation.

In his concluding discussion of this matter, appellant claims (O. B. pp. 32-33, "C") that there are two allegations made of "overt acts" done "directly to plaintiff, rather than through his corporation." He states that his pleading alleges that the defendants communicated with customers of the plaintiff. However, the al-

legations of his pleading show that West Coast Poultry Company, a corporation, was and is conducting said business. The reference in the pleading to "customers of the plaintiff and the West Coast Poultry Company, a California corporation", contained in the referred to paragraph VIII of appellant's pleading [Tr. p. 4, lines 19-20] clearly and obviously is a reference to customers of the business conducted by the corporation—for that is the only business alleged to exist in the pleading. His second claimed "direct" overt act, "that criminal complaints were filed against the plaintiff and not against the corporation", refers to the allegation that two criminal complaints were filed against plaintiff for violation of California Penal Code, section 383b. [Tr. p. 4, lines 27-28.] (See *Erlich v. Municipal Court*, 1961, 55 Cal.2d 552, 11 Cal.Rptr. 758, 360 P.2d 334, upholding the constitutionality of the statute and refusing to prohibit prosecution of appellant thereunder.) Certainly, Civil Rights legislation does not give any citizen the right to be immune from criminal charges being filed against him. The mere filing of such charges could not possibly have deprived appellant of any civil right. Appellant's pleading does not allege whether he ultimately was found guilty or not guilty of the charges. If found guilty, he was not deprived of any civil right. (He does not claim that he was abused or mishandled, physically or mentally, or was deprived of counsel, etc., by appellee Glasner or any other official or any of the defendants.) If found guilty, he was not deprived of any civil right for he violated section 383b, California Penal Code, in such event. His allegation that two criminal charges were filed against him does not allege any violation of any of his civil rights.

By paragraph IX of his pleading [Tr. p. 5, lines 7-10], appellant alleges, "That the interference by these defendants *with the business of the West Coast Poultry Company*", which elsewhere is alleged to be a California corporation, "is a direct interference with the right of the plaintiff to peaceably operate his business and earn a livelihood [sic] for himself and his family". (Italics added.) It is on this basis that he claims in his said pleading that his "privileges and immunities" have been infringed. It is plain that what he seeks as an individual is redress for alleged interference with the business of the corporation. Appellee Glasner's counsel submit that the trial court's decision correctly held [Tr. p. 3, line 12 to p. 4, line 20; *Erllich v. Glasner*, *supra*, 274 F.Supp. at pp. 12-13]:

"As heretofore pointed out, the very essence of the amended complaint here is that plaintiff, an individual, has been deprived of his right to make a livelihood because the corporation in which he and his wife owned stock has been injured through the efforts of persons alleged to be conspirators, one of whom is the Kosher Food Law Representative of California acting under color of state law. Plaintiff's suit under the Civil Rights Act as a stockholder for damage to the corporation and damage he claims ensued to him as a stockholder cannot be sustained. Since a corporation and a stockholder are separate legal entities, a suit may not be maintained by a stockholder for damages to a corporation except in a derivative suit. (*Green v. Victor Talking Mach. Co.* (2 Cir.), 24 F.(2d) 378; *Brixtson v. Woodrough* (8 Cir.),

164 F.(2d) 107; *Eagle v. Horvath* (S.D.N.Y.), 241 F.Supp. 341; *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.* (S.D.N.Y.), 193 F. Supp. 401.) Furthermore, a corporation may not sue under the Civil Rights Act. (*Hague v. C.I.O.*, 307 U.S. 496.) Nor would it appear that any derivative suit can be sustained under such Act. Leaving aside other questions, a suit by one stockholder could lead to a multiplicity of suits and uncertainty as to the distribution of damages recovered.

"To hold that a stockholder or, for that matter, an officer or employee of a corporation may sue for violation of his civil rights when he claims damage because of damage done to his corporation by the action of some person under color of law would lead to absurd results and endless litigation.

"The affidavits and documents on file make it clear that plaintiff's case is grounded on the premise that defendant Glasner, the Kosher Food Law Representative of California, and the other defendants have conspired to injure the West Coast Poultry Company and in so doing injured plaintiff as a stockholder. This, it is asserted, constitutes a deprivation of plaintiff's right to a livelihood.

"It must be concluded that the amended complaint does not state a claim upon which relief can be granted and that there are no facts contained in the affidavits and documents on file which entitle plaintiff to relief."

It is submitted that the matters discussed in this Point I alone suffice to sustain the trial court's judgment and that said judgment may and should be affirmed thereon.

II.

Immunity of Appellee Glasner, California State Kosher Food Law Representative.

As a second or alternative basis for its ruling, the trial court stated [Tr. p. 109; *Erlich v. Glasner*, *supra*, 274 F.Supp. at p. 13]:²

"Another ground in support of the motions by defendants is that of the immunity or defendant Glasner because of being a state officer. In a similar case in which Glasner was sued, the California Court of Appeal held that he was immune. (*Glickman v. Glasner*, 230 Cal.App.2d 120, 40 Cal.Rptr. 719.) The court pointed out that Glasner's activity was within his discretionary duties and that he was immune from tort liability. A footnote to that opinion sets out the California State Personnel Board specifications for a Kosher Food Law Representative."

The trial court in the opinion and decision under review then quoted as footnote 1 the specifications which herein are reproduced as an appendix to this brief.

²Appellee Glasner's counsel submit that this second or alternative basis equally sustains the ruling made. If either basis sustains the ruling, it should and must be affirmed. As expressed by this Court in *S & S Logging Co. v. Barker*, 9 Cir., 1966, 366 F.2d 617, 623: "'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it *must be affirmed*, although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U.S. 238, 58 S.Ct. 154, 158, 82 L.ed. 224. (Emphasis added.)"

Noting that whether a similar holding under the Civil Rights Act would follow was not "entirely clear", the trial court referred to and discussed certain authorities (*Hoffman v. Halden*, 9 Cir., 1959, 269 F.2d 280; *S & S Logging Co. v. Barker*, 9 Cir., 1966, 366 F.2d 617; *Norton v. McShane*, 5 Cir., 1964, 332 F.2d 855; and *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.ed.2d 288), and then stated [Tr. p. 111; *Erlich v. Glasner*, *supra*, 274 F.Supp. at p. 14]:

"... Here, we are dealing with a state representative acting within his discretionary duties and whether or not in so acting he is clothed with immunity from liability under the Civil Rights Act. To hold that the Kosher Food Law Representative or anyone in a similar position is required to establish his good faith in court after his activity was within his discretionary duties would lead to endless harassment and ultimate frustration in carrying out his duties. It is, therefore, concluded that defendant Glasner's activity falls within the letter of his discretionary duties and that he is clothed with immunity under the circumstances of this case."

It is submitted that the ruling of the trial court comes squarely within the rationale of the authorities.

As kosher food law representative of California, appellee Glasner has immunity from suit in the performance of his duties which rule "applies not only to acts essential to the main purposes for which the office was created but also to acts which, although incidental and collateral, serve to promote those purposes. (*White v. Towers*, 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R. 2d 636].)" (*Lipman v. Brisbane Elementary Sch.*

Dist., 1961, 55 Cal.2d 224, 233, 11 Cal.Rptr. 97, 102, 359 P.2d 465, 470; *Tietz v. Los Angeles Unified Sch. Dist.*, 1965, 238 Cal.App.2d 905, 909-910, 48 Cal.Rptr. 245, 248, appeal dismissed and cert. den., *Tietz v. Marienthal*, 385 U.S. 8, 87 S.Ct. 53, 17 L.ed. 7, reh den 385 U.S. 964, 87 S.Ct. 389, 17 L.ed. 309.) That the kosher food law representative of California is immune from liability for discretionary acts and that his prescribed duties are discretionary in nature are well discussed and considered in *Glickman v. Glasner*, 1964, 230 Cal.App. 2d 120, 40 Cal.Rptr. 719. As there held in part:

“‘. . . Those duties specifically include advising interested persons “such as kosher meat and poultry packers, wholesalers, retailers, and restaurateurs on application of the State Kosher Food Law * * *” The Kosher Food Inspector also “conducts investigations, gathers, assembles, and reports facts and evidence.” . . .

“‘These duties obviously involve the exercise of discretion. In carrying out the obligations of his office, the inspector must decide what facts he shall gather, which investigations will be made, and what reports in his reasoned judgment should be made to bring about compliance with Penal Code Section 383b. [Citations.]

“‘. . .

“‘The principle established by these cases may work hardship from time to time, but were the rule otherwise greater mischief would result. . .’”

It may be true that, as said in appellant's brief, the state law or rule of decision regarding immunity is not binding when determining that matter under the Federal Civil Rights Act. However, the state court's ruling

of the discretionary nature of the official's duties should be entitled to great weight, if not conclusive, upon that matter.

In *Barr v. Mateo*, 1959, 360 U.S. 564, 571-572, 79 S.Ct. 1335, 3 L.ed.2d 1434, the Supreme Court, in discussing the matter of immunity, referred to the noted decision by Judge Learned Hand in *Gregoire v. Biddle*, 2 Cir., 1949, 177 F.2d 579, the Supreme Court stating:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to subject all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or

the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the better end to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . .

“ ‘The decisions have, indeed, always imposed as a limitation upon the immunity that the official’s act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment’s reflection shows, however that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by the saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . .’ *Gregoire v. Biddle* (CA2 NY) 177 F.2d 579, 581.

The Supreme Court continued thereafter with (360 U.S. at pp. 572-573):

“We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it has never been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.”

On page 575 of its decision, the Supreme Court held, “*The fact that the action here taken was within the outer perimeter of petitioner’s line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, . . .*” (Italics added.)

So much has been quoted from *Barr* because of its sound reasoning and obvious applicability to most of appellant’s arguments and contentions.

In *S & S Logging Co. v. Barker*, 9 Cir., 1966, 366 F.2d 617, 620, this Court, having quoted from *Barr*’s quotation of *Gregoire*, stated, “Judge Hand’s statement was again alluded to with approval in the recent case of *Garrison v. State of Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.ed.2d 125. The complaint here states clearly what it is claimed that the defendants did. . . . These were acts which were clearly within the perimeter of those defendants’ duties or, as put by the Fifth Circuit

in *Norton v. McShane*, 332 F.2d 855, 857, they were 'acting within the scope of their authority or in the discharge of their duties.' It further was held: "This immunity from suit granted to governmental employees is not limited to those of cabinet rank, nor to those exercising judicial or quasi-judicial functions." Quotation was made again from *Borr*, following which it was said: "And in *O'Campo v. Hardisty*, 9 Cir., 262 F.2d 621, 625, a suit against employees of the Internal Revenue Service, we said: 'At an early date the rule was extended to protect legislative and administrative officers. * * * That minor governmental officers are within the scope of immunity is well established.'" (See also *Bershad v. Wood*, 9 Cir., 1961, 290 F.2d 714, which also noted on page 717, "the delicate balance that must be struck between private injury and public interest"; *Scherer v. Brennan*, D.C.N.D. Ill., E.D., 1966, 266 F. Supp. 758, 761.)

In his brief, appellant relies upon *Robichaud v. Ronan*, 9 Cir., 1965, 351 F.2d 533, a case which this Court discussed in footnote 2 on page 620 of *S & S Logging v. Barker*, *supra*, 366 F.2d 617, as follows:

"2. 'The federal courts have applied the doctrine of official immunity to suits against numerous officials for many different torts.' *Norton v. McShane*, 5 Cir., 332 F.2d 855, 859. Footnote 5 in that opinion contains an extensive list of administrative officers who have been held immune from suit. In *Robichaud v. Ronan*, 9 Cir., 351 F.2d 533, this court held that a prosecuting attorney who acted, not as such, but as a policeman, was not immune from suit under the Civil Rights Acts. As that suit arose under those Acts [citation] the

case is not in point here. In its general discussion of the immunity rule, the court assumed that the immunity was related to acts 'committed by the officer in the performance of an integral part of the judicial process.' This apparent assumption was unnecessary to that decision and it must have been inadvertent for it is plainly contrary to the statements quoted above from *Barr v. Mateo* and *O'Campo v. Hardisty* and contrary to the other cases listed in *Norton v. McShane*, *supra*."

Robichaud does not aid appellant particularly in view of this Court's statements that it erred in assuming that the acts must have been an integral part of the judicial process in order to afford immunity. *Agnew v. Moody*, 9 Cir., 1964, 330 F.2d 868, upheld the immunity of court officials and attaches and did not hold in accordance with appellant's statement made on page 11 of his brief. Appellant cites and relies upon *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.ed. 2d 492, *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.ed.2d 288, and *Cohen v. Norris*, 9 Cir., 1962, 300 F.2d 24, each of which concerned activity of policemen. Appellee Glasner, contrary to appellant's thesis, is not and never was a policeman; he was the duly appointed, qualified and acting Kosher Food Law Representative of the California Department of Public Health; and his actions were clearly within the perimeter of his duties as such. (See quotation, *supra*, from *S & S Logging Co. v. Barker*, 9 Cir., 366 F.2d at p. 620.) *Monroe* involved police brutality and mistreatment; *Cohen* involved unwarranted search and seizure by policemen, coupled with an assault on plaintiff's person; and both involved claimed violation of due process clauses, which

is not here the situation. *Pierson* points out that policemen at common law were always subject to suits for torts committed in the performance of their duties, with the right of defense of good faith and probable cause. *Pierson* does not hold and does not intimate that rules of immunity applicable to judicial, legislative and administrative officials, even those not of cabinet status, has been changed or altered or no longer exists. *Pierson* merely applied existing principles applicable to policemen in tort cases to policemen in Civil Rights suits. And, in *Pierson*, it also was noted (18 L.ed.2d at p. 295): "Monroe v. Pape presented no question of immunity, however, and none was decided." Contrary to appellant's statement on page 10 of his brief, this Court did not overrule *Hoffman v. Halden*, 1959, 9 Cir., 268 F.2d 280, in regard to its holding of immunity of defendant Wair, Superintendent of the Oregon State Mental Hospital, but only overruled the statement on page 292 of that opinion to the effect that a purpose to discriminate or to deprive one of a federal right was an element to be alleged by the plaintiff. (See *Cohen v. Norris*, *supra*, 300 F.2d at pp. 29-30.) In *Hoffman*, judgment of dismissal was affirmed as to defendant Wair but reversed as to others. *Cohen* did not overrule the decision thus made. Appellant also cites and relies upon *Herbert v. Morley*, D.C.C.D.Cal., 1967, 273 F. Supp. 800. While upholding a right to maintain a Civil Rights Act suit against policemen (who were exonerated at trial), the Court there further made a ruling which supports appellee Glasner and which is contrary to appellant's position. Thus, on page 802, it there is stated:

"The complaint as against Harold Kade, M.D., the Los Angeles County autopsy surgeon and deputy coroner, was dismissed before trial on a mo-

tion for summary judgment, the Court finding that at all times mentioned in the complaint he had acted reasonably and within the permissible discretion of his official capacity, and was therefore immune from the charges of the complaint.

“This order for summary judgment in favor of Dr. Kade was based, of course, upon the traditional immunity from suit granted by the common law to a public official engaged in discretionary activities, reasonably performed within the appropriate scope of his official authority and capacity. Here Dr. Kade had full and complete statutory authority and capacity, as holder of the public office of autopsy surgeon and deputy coroner, to conduct the autopsy, make the findings and report his opinions exactly as he did in the course of his duties.

“Dr. Kade’s activities complained of by plaintiff consisted of his autopsy made upon the body of a person who had died after a fall in a bar fight with plaintiff and a later fall at the Santa Monica police station; his set of findings and opinions that the primary cause of death was the blows and fall at the bar; his expression of these findings and opinions to the police officers investigating the death; and his testimony at plaintiff’s trial for murder in the course of which Dr. Kade as an expert stated his opinion that the blows and fall the deceased had suffered in the bar fight with plaintiff could have caused the death.

“When the activities of Dr. Kade were measured by his statutory discretion, and the scope of his official authority, capacity and duties as dep-

uty corner and autopsy surgeon, the Court necessarily found his immunity from suit so compelling that as a matter of law he was dismissed from the action.”

How appellant may claim that the foregoing decision aids or supports his position herein is difficult to see. It does not aid or support appellant but does support appellee Glasner, the Kosher Food Law Representative of California.

The decisions relied on by appellant did not involve discretionary action of a state administrative official, such as appellee Glasner, California State Kosher Food Law Representative. Each and every act charged against appellee Glasner was and is “within the outer perimeter of [his] line of duty” and he has and is entitled to immunity from the fear of civil damage suit in regard thereto. (*Barr v. Matco, supra*, 360 U.S. 564, 575. See also pp. 570-572.)

The basic and fundamental reasons for governmental official's immunity in performance of the discretionary duties annexed to his office here are present. Under numerous authorities, some of which are cited herein, that immunity also sustains the trial court's judgment. (For additional authorities and argument, see Brief for Appellee, Juda Glasner filed in Case No. 20982, *Erlich v. Glasner*, 9 Cir., 374 F.2d 681.)

III.

Appellant's Attack on Sufficiency of Affidavits.

Appellant attacks the sufficiency of the affidavits in support of the alternative motion for summary judgment. It must be remembered that the motions were predicated not only on the affidavits but also upon the records and files of the cause which latter furnished many of the facts upon which judgment of dismissal and summary judgment properly was had.

In the Quimby affidavit, it was pointed out that this action was brought in the name of plaintiff, David Erlich, as an individual, and that the amended complaint is "based upon an alleged 'interference by these defendants with the business of West Coast Poultry Company, a corporation.'" It further was pointed out that the matters involved were those of the corporation, not of the individual plaintiff. [Tr. p. 35, lines 22-29.] The affidavit further called attention to the decision made in *Glickman v. Glasner*, *supra*, 230 Cal.App.2d 120, and its holding that the acts done by defendant Juda Glasner, kosher food inspector for the Department of Health of the State of California, "were of a discretionary character" [Tr. p. 36, lines 12-26] and the trial court was requested to take judicial notice of the matters in said case. [Tr. p. 37, lines 6-14.]

The *Glickman* opinion sets forth the "California State Personnel Board Specification for Class of Kosher Food Representative", which is an official act of the Board made pursuant to California Government Code, section 18000, and which is judicially noticed (Rule 43(a), Fed.Rules Civ. Proc.), thereby showing the duties attached to the office of Kosher Food Law Representative. In *Cooper v. O'Connor*, D.C.Cir., 1938,

69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440, cert. den. 305 U.S. 642, 59 S.Ct. 146, 83 L.ed. 414, it was held (99 F.2d at p. 138), "we may properly take judicial notice of the official duties of each of the appellees and thus determine whether the acts charged in the declaration fell within the general scope of their authority." For convenience of this Court, said "California State Personnel Board Specification for Class of Kosher Food Law Representative" has been quoted and set forth in the Appendix to this brief. Although not appearing in the present transcript, it may be noted that a copy thereof was among the records and files of this cause. (See transcript in 9th Circuit, case number 19872, page 23.)

Among other things, the affidavit of appellee Glasner [Tr. pp. 45-49] set forth: At all time mentioned in the amended complaint, he was an ordained Orthodox Rabbi and the State Kosher Food Law Representative charged with statewide enforcement of the State Kosher Food Law, section 383b of the California Penal Code. He had and has the qualifications set forth in the State Personnel Board Specifications for the Class of Kosher Food Law Representative, Code 9034. Among the duties imposed on him were the conducting of field investigations of complaints regarding kosher foods alleged to be in violation of the State Kosher Food Law, making of reports, securing evidence, and assisting in the preparation of cases for prosecution when necessary. The specifications for the position also required that he be in good standing with a recognized California or national rabbinical body and he was a member of the United Orthodox Rabbinate of Greater Los Angeles in which the various Orthodox groups were

represented. He did not participate in the activities of the Rabbinate if they in any way appeared to be in conflict with the activities related to his position as Kosher Food Law Representative. However, should his office receive a complaint from a member of the Rabbinate or others, it was his duty to conduct investigation. He never attempted to prevent the use of the services of any Orthodox Rabbi or to compel use of the services of any specific Rabbi. He never caused or attempted to cause criminal prosecution of anyone by reason of the specific identity of the Rabbi or Rabbis whose services were being used. In fact, he had nothing to do with the certification of Rabbis. He did not cause issuance of criminal complaints but merely conducted investigations and presented the facts to the appropriate City Attorney or District Attorney's office for such action as that office might find appropriate. If the appropriate governmental representative of these offices saw fit to prepare a criminal complaint, he (Glassner) would by reason of his office sign the same. He did not communicate with customers advising the latter that they would be subject to prosecution if they purchased products from plaintiff or West Coast Poultry Company. He did direct communications to West Coast Poultry Company and other interested members of the industry advising them of the law. (Note: Appellant's own affidavit reveals that appellee Glasner sent advice that he had been advised that four named persons had been disqualified schochtim and that poultry slaughtered by a schochet who has been disqualified is non-kosher under Orthodox Hebrew law "and the sale of poultry slaughtered by a disqualified schochet may result in the prosecution of

the seller under Penal Code Section 383B.” [Tr. pp. 76-77.] The advice of possible prosecution related to seller, not to purchaser, and nowhere did the advice refer to or mention either plaintiff or “his” corporation, West Coast Poultry Company.) He (Glasner) did not inform interested parties that if they purchased kosher products from plaintiff or West Coast Poultry Company that citations would be issued against them. The affidavit contains more facts but sufficient has been sent forth to show that he was acting within the perimeter of his duties as the State Kosher Food Law Representative.

Appellant’s brief states that appellee Glasner places the responsibility of criminal prosecutions on the City or District Attorney “without any attempt to explain why plaintiff *presumably* was singled out as the defendant rather than West Coast Poultry Company, the corporation”, etc. (O.B. p. 36.) There is no such presumption that plaintiff was singled out. He was president and general manager of the corporation and himself was subject to criminal prosecution for the violation of the California Kosher Food Law. There is no showing as to whether the corporation ever was or was not also criminally prosecuted. In *West Coast Poultry Co. v. Glasner*, 1965, 231 Cal.App.2d 747, 42 Cal. Rptr. 297, the corporation appealed from an adverse judgment. The opinion reveals that the corporation’s complaint therein alleged, among other things, that Glasner “has filed complaints with the district Attorney charging appellant with violating the Penal Code, section 383b, although he knew full well that the establishment was kosher.” This, of course, has nothing to do with the instant case. Appellant’s statement is

a “red herring” which seeks to divert attention from that which controls and governs.

Of like ilk is appellant's statement on page 35 of his brief to the effect that appellee's affidavit is false wherein he set forth that he was aware that three companies (named and including Pines Poultry) commenced an action for injunction or similar relief against West Coast Poultry Company and that he (Glasner) contacted the attorney for plaintiffs therein to see if that action did develop evidence of violation of the Kosher Food Law “because affiant felt it his duty to do so” and that he did not enter into any agreement with any of said plaintiffs or in any way sponsor said action. Appellant refers to the so-called Goss affidavit which was but a copy of an affidavit made by Goss in a California suit (not herein) and was attached as Exhibit 11 to appellant's affidavit. [Tr. pp. 88-90.] It is extremely doubtful that this Exhibit 11 is anything other than pure hearsay on hearsay as here presented. (It is not even a certified copy of the state court affidavit.) Be that as it may, the Goss statement was to the effect that in June or July of 1963, “Rabbi Glasser” (query—would this refer to Rabbi Glasner?) came to Goss' market and asked whether Goss could compete with those not using the same process he did in koshering chicken; Goss replied “No”; he was asked if he thought it a good idea for the authorities to be shown his costs of koshering chicken so they would establish a fair-trade price and whether Goss would appear in a matter like that; Goss replied he would; three or four weeks later “Rabbi Glasser” telephoned and asked Goss if you would be in Mr. Silver's office at a certain time; Goss went there alone and waited;

sometime later "Rabbi Glasser" showed up; he asked the girl in the office where Mr. Silver was and she stated Silver was expected shortly; they waited a while and on inquiry made by "Rabbi Glasser" the girl said she could not find papers and suggested to Goss that he sign one in blank so he could leave; Goss was tired of waiting, signed the paper and left with "Rabbi Glasser"; near the elevator, they met a man to whom "Rabbi Glasser" introduced Goss stating the man was Mr. Silver; later, Goss read a clipping which stated that he and others were suing West Coast Poultry and others; he called "Rabbi Glasser" and said he did not want to sue anyone to which the Rabbi replied it must be a mistake. (This supports appellee Glasner that he did not advocate or sponsor the injunction suit.) The remainder of the Goss statement (if it may be considered at all) concerns Goss' actions with his own counsel in contacting Mr. Silver and opposing counsel in securing a withdrawal from or dismissal of the suit—in none of the latter of which any reference is made to any Rabbi. If anything, the Goss statement merely shows that a Rabbi had inquired concerning effective competition with those using a different process and whether costs should be shown to establish a fair-trade price and that the Rabbi, when subsequently informed that the suit mentioned had been brought, stated it was a mistake. This scarcely supports any of appellant's claims and certainly does not show any error in the trial court's determination made herein.

Finally, appellant's brief expresses umbrage at the fact that the affidavit of Glasner makes reference to the affidavit of appellee Zilberstein. The latter affidavit was one of the documents in the records and files

and obviously was a proper matter for consideration by the trial court in making its ruling. Whether it was or was not referred to in the Glasner affidavit does not make it any less a matter for consideration. The Zilberstein affidavit [Tr. pp. 8-17] is lengthy. It describes in detail the composition of the United Orthodox Rabbinate of Greater Los Angeles and its unincorporated association status as an ecclesiastical parent body of three orthodox groups located in the Los Angeles area, with one of its principle functions to concern itself with adherence to Hebrew statutes concerning dietary laws relating to Kosher foods and to issue warnings and take action against those who offend these laws. The Rabbinate is a non-profit body and rabbinical services rendered as an ecclesiastical body for enforcement of the Jewish dietary laws are rendered without compensation of any kind. It has the power and duty to disqualify a schochet who is slaughtering or processing Kosher meats contrary to that which is to be had. For example, in March of 1963, schochet Abramowitz was instructed by telegram sent in the name of the United Orthodox Rabbinate "to desist slaughtering of poultry if dressed thereafter in heated water." A second telegram was sent later advising that he was still violating the "Kashbruth instructions". No reply was received and thereafter an edict of disqualification was prepared and signed. (Note: appellee Glasner was not present and was not a signer of the edict.) The acts of the United Orthodox Rabbinate were done as an ecclesiastical body of Rabbis, duly authorized to consider the matter, to make a determination thereof and to render a decision and decree—all in accordance with and as required by Rabbinical

Law. The affidavit described the position of Schochet and the supervision to be made of a schochet. A complete reading of the Zilberstein affidavit reveals additional facts.

Appellant makes the statement that the court, not the ecclesiastical body, is the forum to determine the ecclesiastical question of whether the schochet is or is not complying with Hebrew religious laws in slaughtering and processing Kosher (or claimed Kosher) meats. That is incorrect, as a moment's reflection will reveal. The law permits ordained ministers, rabbis and priests to perform marriages which will be recognized by the civil governments. The civil authorities do not pretend to have the ecclesiastical right or duty to defrock or expel ordained persons. Only the ecclesiastical body has that right. If the latter has defrocked or expelled one who was ordained so that the latter no longer is an ordained minister, rabbi, or priest, certainly it cannot successfully be argued that the latter thereafter may perform any marriage which would be considered legal by civil authorities.

As observed by the trial court in its opinion [Tr. pp. 111-112; *Erlich v. Glasner*, *supra*, 274 F.Supp. at p. 14]:

"This case presents another problem which, while not requiring a decision, warrants comment. Although plaintiff contends and defendants acquiesce that the state law under which defendant Glasner acted relates to dietary law rather than laws affecting religion, plaintiff makes it clear that he expects this court and, in this case, a jury which has been demanded to decide who is and who is not an orthodox rabbi, what is and what is not kosher

poultry, and whether plaintiff's *schoictim* were *treife*. Certainly these issues, if relevant, require probing into the qualifications of orthodox rabbis and interpretations to establish whether poultry is, in fact, kosher and such other matters as whether plaintiff's *schoictim* were *treife*.

"It is to be noted that among other matters set forth in plaintiff's affidavit he asserts that defendant Glasner is not an orthodox rabbi and that members of the congregation will be subpoenaed to 'testify that there was mixed seating between men and women.' This alleged conduct of defendant Glasner is referred to as 'his transgressions regarding mixed seating.' This hardly seems a dietary matter."

At least two if not more times in his brief, appellant refers to the allegation in his amended complaint to the effect that Salter and Reyna, former employees of plaintiff, were offered payment to falsely testify that plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements. (O.B. pp. 4 and 27.) The Glasner affidavit expressly and affirmatively swears that he did not participate or direct any arrangement whereby either of these persons "were to appear as witnesses and at no time either offered them a payment or suggested to them, or either of them, that they testify falsely." Significantly, no affidavit of either of these persons was produced by appellant. And significantly appellant's own affidavit is silent thereon. This factor, which appellant apparently seizes upon in his brief, was entirely shown to be false as likewise are many other charges made by appellant.

More could but need not be said concerning the affidavits. The trial court's determination is not only supported thereby but also by the records and files, including the allegations of plaintiff's amended pleading. These show (1) that the damages and redress sought are those for which plaintiff, as an individual, was not entitled since they concern and belong to West Coast Poultry Company a corporation; and (2) that the acts done by appellee Glasner were within the perimeter of his official duties and authority as the State Kosher Food Law Representative.

Conclusion.

For the foregoing reasons and each of them, it is respectfully submitted that the judgment of the trial court should and must be affirmed as to appellee Glasner.

Respectfully submitted,

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Of Counsel.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

WAYNE VEATCH

APPENDIX.

"CALIFORNIA STATE PERSONNEL BOARD

specification for the class of

KOSHER FOOD LAW REPRESENTATIVE

"Definition:

"Under direction of the Chief, Bureau of Food and Drug Inspections, Department of Public Health, to carry out the statewide program of investigation and inspection in connection with the enforcement of the State Kosher Food Law; and to do other work as required.

"Typical Tasks:

"As assigned, in the major metropolitan areas of the State, initiates and carries out a field inspection program designed to secure understanding of and compliance with the State Kosher Food Law; visits and inspects meat and poultry markets offering kosher products for sale to assure that such products have been properly identified, labeled, segregated, advertised, and otherwise handled in a manner consistent with orthodox Hebrew religious ritual and custom; inspects establishments such as delicatessens, restaurants, catering firms, and rest homes purveying kosher foods to see that products sold as kosher are, in fact, kosher and that they have been processed and served in a manner and with dishes, utensils, and vessels prescribed by Hebrew Law and customs; makes field surveys to determine that kosher foods are properly prepared, stored, processed, labeled and advertised; meets with and advises interested persons such as kosher meat and poultry

packers, wholesalers, retailers, and restaurateurs on application of the State Kosher Food Law and on proper practices to follow to insure compliance with this law; confers with violators of the Kosher Food Law in an effort to secure voluntary compliance with its provisions; conducts field investigations of complaints regarding kosher foods alleged to have been prepared, packaged, sold, or advertised in violation of the State Kosher Food Law; conducts investigations, gathers, assembles, and reports facts and evidence; assists in the preparation of cases for prosecution when necessary; works cooperatively with representatives of other governmental agencies including the State and Federal Departments of Agriculture and local law enforcement officials; prepares reports of field activities.

“Minimum Qualifications:

“Ordained orthodox rabbi, in good standing with a recognized California or national rabbinical body and accredited to function in all spheres of the rabbinate.

and

“Education: Completion of theological studies for ordination as a rabbi at a recognized Jewish theological school.”

In the
United States Court of Appeal
For the Ninth Circuit

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN;
JUDA GLASNER and OSHER ZILBERSTEIN
doing business as the UNITED ORTHODOX
RABBINATE of GREATER LOS ANGELES,
UNITED ORTHODOX RABBINATE of
GREATER LOS ANGELES, A. M. BAUMAN
and JACOB ADLER,

Appellees.

Appellant's Closing Brief

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DAVID ERLICH,

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JUDA GLASNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN; JUDA GLASNER and OSHER ZILBERSTEIN doing business as the UNITED ORTHODOX RABBINATE of GREATER LOS ANGELES, UNITED ORTHODOX RABBINATE of GREATER LOS ANGELES, A. M. BAUMAN and JACOB ADLER,

Appellees.

No. 22480

Appellant's Closing Brief

PRELIMINARY STATEMENT

Juda Glasner is the only defendant who has submitted an appellee's brief. This defendant asks affirmance of the judgment on the two grounds stated by the trial court:

1. That the injured party is the corporation, not plaintiff.

2. That the defendant, Juda Glasner, as an employee of the State of California, is immune from prosecution under the Civil Rights Act.

Appellee Glasner adds a third ground for affirming the judgment:

3. That this Court should accept as true and correct the contentions of fact advanced by the defendant Glasner in support of his motion for summary judgment, and reject those facts of the plaintiff submitted in opposition thereto.

It is respectfully submitted that all of the above contentions are contrary to established law.

POINT I

THE INJURED PARTY IN THIS CAUSE IS THE PLAINTIFF, DAVID ERlich, AN INDIVIDUAL, AND NOT THE WEST COAST POULTRY COMPANY, A CALIFORNIA CORPORATION.

That plaintiff, David Erlich, an individual, is the injured party in this cause is fully explored in Point IV of Appellant's Opening Brief. Appellee counters with an excellent dissertation that the law does not permit a corporation to maintain an action for injuries for violation under the Civil Rights Act and even includes in his discussion the elements required to maintain a derivative action under Sec. 834 of the California Corporations Code. (Appellee's Brief, page 12) and then on page 13 states:

“Appellant's suit is not a derivative suit on behalf of the corporation although the damages claimed are for interference with the corporation's business.”

This statement, of course, is not entirely correct, for appellant in his opening brief specifically details the injuries done directly to him by the defendants. These are set forth in the overt acts alleged in Paragraph VIII of the amended complaint (Tr. pp. 4-5). Since allegations of the complaint are presumed true on a motion to dismiss (*Cooper v. Pate*, (1964) 378 U.S. 546, 84 S. Ct. 1733), and since the facts alleged in the amended complaint are neither denied nor discussed in Glasner's affidavit in support of his motion for summary judgment (Tr. pp. 45-49), a statement as to the law, even though correct, is meaningless.

Appellant in his Opening Brief emphasized the fact that the defendant Glasner in depriving him of his civil rights under the color of state law attacked him directly, and also indirectly through the close family type corporation. As to that portion of the amended complaint where it is alleged that the defendant, Glasner, used his office as Kosher Food Law Inspector to attack the plaintiff directly, the elements of a cause of action under the Civil Rights Act are sufficiently stated. A question does exist, however, whether the injuries to plaintiff through the corporation are sufficient and are adequate to withstand a motion to dismiss for failure to state a claim.

In this connection it seems to be the position of the appellee that although an individual may have sustained harm through a corporation, the cause of action always remains in the corporation and never in the

individual and refuses to discuss the fact that a situation may exist where defendant's tort may damage the individual directly even though the harm is done through a corporation.

If the injury was done to a public corporation with many shareholders, the cause of action would presumably lie only with the corporation. But West Coast Poultry is a small corporation, where all of the stock is owned by the plaintiff and his wife and they are also the sole officers and directors. Moreover, this organization is identified with the public as the plaintiff. In such an event, where the individual and the corporation are considered by the public as one, the tortious conduct of the defendant damages both at the same time and not separately and independently.

Whether these conditions do or do not exist would seem to be a question of fact to be determined by a trier of fact, under the peculiar circumstances of the case, and not as a solid question of law. That is the real meaning of *Sutter v. General Petroleum Corp.* (1946), 28 C. 2d 525, 170 P. 2d 898, cited in Appellant's Opening Brief, and what the Supreme Court of the State of California meant when it said on page 530:

“But ‘if the injury is one to the plaintiff as a stockholder and to him individually and not to the corporation, as where the action is based on a contract to which he is a party, or in a right belonging severally to him, or on a fraud affecting him directly, it is an individual action . . .’”

It is not the unsupported statement of the appellee that whenever a corporation is involved, regardless of the fact that a stockholder as an individual is also directly injured, the cause of action must always remain with the corporation and never with the individual.

In *Toboni v. Pennington Millinery Co.* (1959), 172 C.A. 2d 47, 341 P. 2d 845, which defendant relies upon on page 13 of his brief the court found that the:

“ . . . gravamen of her complaint is a wrong done to the corporation, a mulcting of its assets, a misappropriation of its business and properties by two of its directors, aided and assisted by Tom Cooney and the Tom Cooney Company, a business competitor of the Pennington Company. Plaintiff has merely a stockholder's interest in the allegedly mismanaged mismanagement and mulcted corporation. (*Tobini v. Pennington Millinery Co.* on page 50.) ”

This of course, made the situation a derivative action and since there was no direct injury to the plaintiff, *Sutter v. General Petroleum Corporation* was not involved.

On page 16 of his brief, appellee in referring to the complaint of appellant that the criminal charges for violation of California Penal Code Sec. 383b was filed directly against him rather than the corporation, states:

“Certainly, Civil Rights legislation does not give any citizen the right to be immune from criminal charges being filed against him. The mere

filing of such charges could not possibly have deprived appellant of any civil rights. Appellant's pleading does not allege whether he alternately was found guilty or not of the charges. If found guilty he was not deprived of any civil rights. (He does not claim that he was abused or mishandled, physically or mentally, or was deprived of counsel, etc. by appellee Glasner or any other official or any of the defendants.) If found guilty, he was not deprived of any civil right for he violated Sec. 383b, California Penal Code, in such event. His allegation that two criminal charges were filed against him does not allege any violation of any of his civil rights."

Since Glasner was the complaining witness in both cases, and actively participated in both trials, both as a witness and as an investigating officer sitting at the counsel table with the prosecuting attorney, it is interesting to note that appellee does not state that at the conclusion of the first trial the jury brought in a verdict of not guilty, and that at the second trial the charges were dismissed upon the prosecutor's opening statement. Moreover appellee ignores the force of appellant's argument; why if the corporation was the offender, charges of violating Sec. 383b was brought only against Erlich and not against the corporation (App. Op. Br. pp. 33, 36).

The fact still remains that Erlich as an individual, was the deliberate, intended victim of the acts of Glasner, and this is further borne out by the fact that al-

though criminal complaints were also filed against employees Abramovitz, Glickman, Orlanski and Friedman, never once was a criminal complaint for violating Sec. 383b ever filed against the corporation whom the appellee now insists was always the real and true offender.

It is respectfully submitted that there are sufficient facts in the record to indicate that the conduct of the defendants injured the plaintiff directly, and not the corporation, and since this cause was decided on a motion for summary judgment, these facts should be determined by a trier of fact rather than on affidavits.

POINT II

REGARDING THE IMMUNITY OF APPELLEE GLASNER, THE CALIFORNIA STATE KOSHER FOOD LAW REPRESENTATIVE.

Appellee premises this argument with the statement that if there is any basis for sustaining the trial court's ruling, it should and must be affirmed (Appellee's Brief, p. 19).

Appellant differs. The statement would be correct if the appeal was from a judgment rendered after a trial on the merits. It is not applicable on a review from a judgment granting a motion for summary judgment, where the only question involved is whether an issue of fact exists, not the correctness of the facts (*Byrnes*

v. Mutual Life Insurance Company of New York, (9th Cir., 1964), 217 F. 2d 497; cert den. 348 U.S. 971, 75 S. Ct. 532).

Moreover, the record on appeal from a summary judgment is reviewed by an appellate court in the light most favorable to the appellant.

Poller v. Columbia Broadcasting System, (1962) 386 U.S. 464, 473; 82 S. Ct. 486, 491.

Carr v. City of Anchorage, 9th Cir., 1957, 243 F. 2d 482, 483.

Despite the fact that the courts have uniformly held since the decision of *Monroe v. Pape* in 1961 (365 U.S. 167; 81 S. Ct. 473; 5 L. Ed. 2d 492) that public officials (judges, prosecutors and legislators excepted) have no immunity under state law in an action brought under the Civil Rights Act, appellee insists that such immunity bars the present law suit as a matter of law and in support thereof cites either decisions that were decided prior to *Monroe v. Pape* or cases that do not involve the Civil Rights Act.

Barr v. Matteo (1959) 360 U.S. 564; 79 S. Ct. 1335, 3 L. Ed. 2d 1434, (Appellee's Brief, pp. 22 et seq.) was an action for damages for libel based on an alleged unauthorized press release. Moreover, defendant was a federal employee and not subject to an action under the Civil Rights Act. Violation of Civil Rights Act is applicable only to deprivation of rights when defend-

ant is acting under color of *state* law, not Federal law. (*Norton v. McShane* (5th Cir., 1964) 332 F. 2d 855, 862.)

S & S Logging Co. v. Barker (9th Cir., 1966) 366 F. 2d 617 was mentioned in Appellant's Opening Brief (Appellant's Opening Brief, p. 14) is not an action brought under the Civil Rights law, and although mentioned as an authority by appellees on pages 24-25 of his brief, the distinction is ignored.

Norton v. McShane (5th Cir., 1964) 332 F. 2d 855, mentioned on pages 24 and 25 of appellee's brief, also involved an employee of the federal government, which by the nature of their employment were immune from actions under the Civil Rights Act. This distinction mentioned on pages 14-15 of Appellant's Opening Brief is also ignored by Appellee.

On page 24 appellee refers to the case of *Garrison v. State of Louisiana* (1964) 379 U.S. 64; 85 S. Ct. 209, 13 L. Ed. 2d 125 which also did not involve a Civil Rights action. This was a criminal case where the defendant was convicted of criminal defamation and reversed on the grounds that the Louisiana criminal libel statute incorporated constitutionally invalid standards in context of criticism of official conduct of public officials in violation of the first amendment guaranteeing free speech.

On page 26 appellee makes an interesting distinction. He states:

“Appellant cites and relies upon *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed. 2d 492, *Pierson v. Ray*, 1967, 386 U.S. 547, 87 St.Ct. 1213, 18 L.Ed. 2d 288 and *Cohen v. Norris*, 9th Cir., 1962, 300 F. 2d 24, each of which concerned activity of policemen. Appellee Glasner, contrary to appellant’s thesis, is not and never was a policeman; he was the duly appointed, qualified and acting Kosher Food Law Representative of the California Department of Public Health; . . .”

and further emphasises the fact that in these three cases police brutality was involved, which is not the present situation.

Although appellee refers to “policemen,” presumably he intends to encompass all law enforcement officers and not limit his analogy to only those employed by a city. In this connection it is respectfully submitted that appellee Glasner’s position was that of a law enforcement officer (California Health and Safety Code Sec. 214; *Glasner v. Dept. of Public Health*, 1967, 253 A.C.A. 813, 814-815; 61 Cal. Rptr. 415).

In any event, and without belaboring the point, the distinction is not applicable because the Civil Rights Act, (42 U.S.C.A. 1983 et seq.) is applicable to all state employees and immunity for liability thereunder is available only to prosecutors, members of the legislature, and members of the judiciary.

Although appellee has referred this court to many cases which hold that immunity is a perfect defense in

actions brought against public officials, not one of them involved a proceeding under the Civil Rights Act against a state official, and not one of those cases referred to by appellee involving civil rights held that a state official is immune from liability under the Civil Rights Act for conduct falling within the discretionary duties of his employment. The only such expression is contained in the opinion of the trial court in the present cause.

Although immunity from liability under the Civil Rights Act is still no defense in an action for violation under the Civil Rights Act, all is not lost to the civil service employee, for the Supreme Court in *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S. Ct. 1213; 18 L.Ed. 2d 288 held that the defense of good faith and probable cause is available to a defendant in an action under sec. 1983.

Moreover, whether what the defendant Glasner did and the circumstances under which he did them were actually discretionary as contended by appellee, or not as contended by appellant (Appellant's Opening Brief, Point II, pages 16-18), are issues of fact which should be determined by a trier of fact.

POINT III

REGARDING THE SUFFICIENCY OF GLASNER'S AFFIDAVIT.

Appellee's position seems to be in his Point III that this court should accept as correct Glasner's version of what transpired and accordingly affirm the judgment. That, however, is not the function of a summary judgment, for in a motion for summary judgment the court may not weigh facts. The purpose of a summary judgment is to determine whether a triable issue of fact exists, not to determine the facts, and the burden is on the moving party to show that no genuine issue of material facts exists. These are basic principles in all motions for summary judgment.

Appellee's position is strange. He states:

"It must be remembered that the motions were predicated not only on the affidavits but also upon the records and files of the cause which latter furnished many of the facts upon which judgment of dismissal and summary judgment properly was had." (Appellee's Brief, page 30.)

If this is so, then obviously the judgment must be reversed, for the judgment of dismissal could only be based upon the fact that the amended complaint failed to state facts sufficient upon which to predicate a claim and summary judgment only upon the affidavit in support of the motion indicating that no issue exists. If the court actually considered records and files there is no

way of knowing the basis of the court's decision, or what the court relied upon to reach its conclusion. Appellant is of the opinion, however, that the reason for the court's decision is fully contained in its opinion (Transcript, pp. 106-112; *Erlich v. Glasner*, 274 F. Supp. 12.) which also contains the statement:

“Since this opinion sets forth the basis for the court's ruling, no finding of fact and conclusions of law shall be required.” (Tr. p. 112.)

In this connection it should be specifically noted that the trial court did not discuss the affidavits of either the plaintiff or the defendants, and specifically confined its ruling to two points:

1. The real party in interest is the corporation and not the plaintiff (Paragraph 2).

2. That because of the discretionary nature of his duties the defendant Glasner was immune from prosecution under the Civil Rights Act.

However, certain statements by appellee regarding the affidavits require answers. On page 32 appellee in referring to his affidavit states:

“He [Glasner] never caused or attempted to cause criminal prosecution of anyone by reason of the specific identity of the Rabbi or Rabbis whose services were being used.”

This, of course, is in direct contradiction to the criminal complaint filed by Glasner on May 20, 1965

charging Rabbi Orlanski and Rabbi Friedman, the supervising Rabbis of the plaintiff with violating sec. 383b of the Penal Code of the State of California (Tr. p. 78). Although mentioned by Erlich in his affidavit (R. T. p. 57) it is ignored by appellee, who takes the position that this court should and must adopt appellee's statements to the contrary. And what is equally interesting is that immediately following the hearing of this matter, Rabbis Orlanski and Friedman joined the United Orthodox Rabbinate of Greater Los Angeles and plaintiff lost their services as supervising Rabbis. (Tr. p. 57.)

On page 33 appellee states:

“There is no showing as to whether the corporation ever was or was not also criminally prosecuted.”

It is respectfully submitted that appellee is evading the situation. Certainly Glasner as the sole enforcement officer for the Department of Health would know whether the corporation ever was or was not criminally prosecuted, and the answer is that it wasn't. Assuredly if it had been, it would have been mentioned in Glasner's affidavit or at least in his brief.

On page 34 appellee for the first time raises the question that some of the exhibits may be hearsay or hearsay on hearsay. No such objection was raised in the court below, and if it had been, the originals would have been produced. Where no objection is made that

statements contained in documents are hearsay, the contents may be considered by the court. (*Continental Oil Co. v. United States*, 9th Cir., 1950, 184 F. 2d 802, 813.) Of course, if Rabbi Glasner differs with Mr. Goth as to what transpired, that question should be determined by a trier of fact and the court not accept Glasner's version as to what actually happened.

On page 37 appellee states:

“Appellant makes the statement that the court, not the ecclesiastical body, is the forum to determine the ecclesiastical question of whether the schoichet is or is not complying with Hebrew religious laws in slaughtering and processing Kosher (or claimed Kosher) meats.”

But appellant makes no such claim. What appellant does claim and contend is that the United Orthodox Rabbinate, in which Glasner is an active member, decided by itself it would be the sole body to determine what is and what is not Kosher, and extend their influence to every Jew regardless of whether they were a member of this organization or not. And if the law permits Rabbis to perform marriages which will be recognized by the civil government, as appellee correctly states on page 37, appellee should have carried his example a bit further and explained the validity of a marriage performed by a Rabbi who is not a member of the United Orthodox Rabbinate and is not recognized as a Rabbi by this organization.

On page 38 appellee refers to the testimony of

“ . . . Salter and Reyna, former employees of plaintiff [who] were offered payment to falsely testify that plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements.”

Appellee then goes on to argue that since Glasner in his affidavit expressly disavowed his participation therein, the court should accept his statement as true, particularly since no affidavit of either of these persons were produced by appellant.

Erich in his affidavit states:

“ . . . and that the defendants in this cause and the other persons involved refused to give affidavits stating the facts. These facts will have to be obtained by way of discovery proceedings.”
(Tr. p. 52.)

Rule 56(e) of the Rules of Civil Procedure regarding summary judgment states in part:

“The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.”

Upon the argument of the motion for summary judgment it was suggested to the court by counsel for the plaintiff that ruling thereon be deferred until after discovery proceedings were had to establish these facts.

The request was denied and in view of the fact that the court rested its decision on two legal principles, the refusal to permit discovery proceedings is understandable.

The false testimony from Salter and Reyna was obtained by Etner who turned it over to Glasner with an explanation as to how he obtained it, and Glasner thereupon took these statements to the District Attorney (Tr. p. 59). As a conspirator Glasner was equally liable with Etner. Whether Glasner discussed Salter and Reyna with Etner before Etner visited them is something discovery proceedings will reveal. But there is no doubt Glasner accepted this information and promptly acted on it.

POINT IV

SUMMARY

1. The facts in this case clearly indicate that the arrows of the defendants were directed at the plaintiff; that it was the plaintiff who was injured directly by the shafts and not the corporation, and that he is the real party in interest.

2. That although the defendant Glasner had discretionary acts in the performance of his duties, what he did was not within that discretion.

3. In any event immunity, even immunity for discretionary acts, is not a defense in an action under the Civil Rights Act.

POINT V
CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment in favor of the defendants should be reversed.

Respectfully submitted,

JOSEPH W. FAIRFIELD,

ETHELYN F. BLACK,

and

ALFRED W. OMANSKY

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH W. FAIRFIELD

Attorney

